United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF & APPENDIX

76-7104

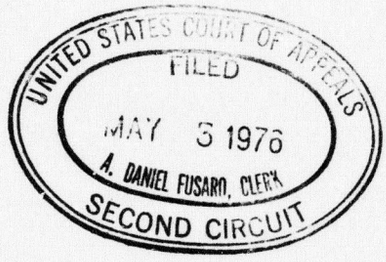
No. _____
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

B

KENNETH A. ANDERSON
Plaintiff - Appellant

v.

ABEX CORPORATION; THE RETIREMENT BOARD OF THE RETIREMENT PLAN FOR SALARIED EMPLOYEES OF ABEX FORPORATION; DONALD K. RENNIE; and ILLINOIS CENTRAL INDUSTRIES, INC.
Defendants - Appellees



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

HON. JAMES S. HOLDEN, PRESIDING

BRIEF FOR APPELLANT
and appendix

Richard J. Wright, Esq.
DeBonis and Wright, P.C.
25 Main Street
Poultney, Vermont 05764
Attorneys for Appellant

PAGINATION AS IN ORIGINAL COPY

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I. Preliminary Statement

The decision below was rendered by the Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont.

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III. Statement of the Issues

A. Does the United States District Court for the District of Vermont have personal jurisdiction over the defendants in this cause?

B. Does the cause of action asserted in plaintiff's complaint arise from conduct or activity of the defendants having sufficient minimum contacts with the State of Vermont to allow Vermont courts to exercise personal jurisdiction over the defendants?

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IV. Statement of the Case

A. Nature and Disposition

This action was initiated by a retiree alleging violations by the defendants of their duties under the retirement plan applicable to the parties. The retiree further alleged a violation by defendants of the duties imposed upon them as administrators of a retirement plan by Title 29 U.S.C. §301 et seq.

A Notice of Appearance and Motion to Dismiss with accompanying affidavits was filed on behalf of the defendants. No answer was filed to the complaint in the lower court.

After hearing, the lower court, on December 9, 1975 granted the defendants' Motions to Dismiss for lack of personal jurisdiction. Appendix, p.50.

A Motion for Relief from or Amendment of Judgment Order was filed by plaintiff and, after hearing by the lower court, denied on January 30, 1976. Appendix, p.60.

A Notice of Appeal was filed on behalf of plaintiff on February 26, 1976.

The retiree has been domiciled in Vermont since September 1, 1970 and retired from Abex Corporation on April 1, 1971, working thereafter as a special consultant as a per diem basis. Appendix, p.56.

At the time of the retiree's retirement, he became entitled to benefits under the retirement plan established by Abex Corporation and known as The Retirement Plan for Salaried Employees of Abex Corporation. Since becoming entitled to benefits under the plan, the retiree has received monthly checks from the Retirement Board. The Retirement Board of the plan consists of members appointed by the Board of Directors of Abex Corporation. Appendix, p.37.

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The only business of the Retirement Board is the administration , the plan, disbursement of benefits as and when due, and the implementation of elections made by retirees concerning their benefit options. The retiree has alleged in his complaint that the Retirement Board failed to fulfill their duties to him under the terms of the plan. Appendix, p. 24.

Abex Corporation is a subsidiary of I.C. Industries, Inc., (formerly known as Illinois Central Industries, Inc.) and subject to their overall management and control. In May of 1974, the Retirement Board designated the Illinois Central Industries, Inc. Employee Benefit Trust as an investment medium for the assets of the fund. Appendix, p. 28.

The retiree has alleged in his complaint that this action of the Retirement Board is in violation of their duties under the plan. Appendix, p. 25.

The retiree further alleged in his complaint a failure on the part of defendants to provide information requested by him within 30 days of the request as required by the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §§301 et seq. Appendix, p. 26.

This cause is controlled by that Act as the events which gave rise to the cause of action occurred prior to January 1, 1975. See, 29 U.S.C. §1031.

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V. ARGUMENT

A. STATUTORY GRANTS AND LIMITATIONS OF PERSONAL JURISDICTION OVER NON-RESIDENTS

1. FEDERAL COURTS

The power of federal courts over persons differs in some respects from the power of courts in the forum state. For example, the power to command attendance by witnesses is broader and may be exercised over individuals outside the boundaries of the forum state. See, Fed.R. Civ. P. 45. It has been stated as a general rule however, that the power of federal courts to exercise personal jurisdiction over non-residents of the forum state is as broad as the power granted to the courts of the forum state. Fed.R. Civ. P. 4 (e); Marsh v. Kitchen, 480 F.2d 1270 (CA2 NY 1973). In addition, the extent of that power is a state question to be determined by the statutes of the forum state and any interpretations thereof by the state's courts. Georgia-Pacific Corp. v. WHDH Corp., 374 F.Supp. 1076 (DC Me 1974). In determining whether the lower court had personal jurisdiction over the defendants, we are really making a determination of whether or not a state court, under the same circumstances, could exercise personal jurisdiction and grant a binding judgment against the defendants.

2. VERMONT'S LONG ARM STATUTES

Vermont has enacted a so-called long arm statute which was in effect prior to 1971 and controls the present case. In response to changes which had occurred in the area, Vermont courts were granted personal jurisdiction over non-residents in terms of constitutional limits. Title 12 V.S.A. §913 (b). granted personal jurisdiction to Vermont courts over any non-residents whose

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contact or activity with Vermont was sufficient to support a personal judgment against them. Appendix, p.67. The statute simply says that personal jurisdiction over non-residents may be exercised whenever consistent with constitutional limitations of due process.

A similarly worded statute applies specifically to foreign corporations. Title 12 V.S.A. §855 provides for an alternative method of invoking personal jurisdiction over foreign corporations. Appendix, p.66. This method allows for service to be made upon the Secretary of State of Vermont as agent appointed by law. Although the agent is deemed to be appointed because the foreign corporation is "doing business" in the state, the term "doing business" is defined as having contact with the state or activity in the state sufficient to support a personal judgment against the foreign corporation. The statute becomes effective against any foreign corporation whenever the exercise of personal jurisdiction over them would be consistent with constitutional limitations of due process. When a foreign corporation is involved, personal jurisdiction is granted to Vermont courts by two separate statutes, each of which acts independently of the other.

B. CONSTITUTIONAL LIMITATIONS TO THE EXERCISE OF PERSONAL JURISDICTION OVER NON-RESIDENTS

1. TERRITORIAL LIMITATIONS

The idea that each state can exercise jurisdiction over any person or thing found within its borders is consistent with their standing as independent political states. This theory however, implies its obverse, that the power to exercise jurisdiction ends at the state borders. If the latter is true, then personal judgments against non-residents served outside the state are beyond the powers of the forum state and therefore void. This principle was the basis for the decision reached in Pennoyer v. Neff, 95 U.S. 714 (1877). Since that

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decision, Americans and american corporations have become increasingly mobile and it has been recognized that states have a right to provide a means of redress for their citizens when wronged by non-residents whose entry into the state has resulted in the injury. The theory that non-resident corporations and individuals who remained outside the borders of the forum state were immune from suit slowly lost its vitality.

The power to exercise personal jurisdiction proceeded first upon theories of agency. State statutes were enacted which appointed an agent for any non-resident who operated an automobile within the state. These statutes were upheld on the theory that such activity was a privilege which the forum state could grant conditionally. See, Hess v. Pawloski, 274 U.S. 452 (1972). Later cases indicated clearly that agents could be appointed without the actual consent of the principal. See, Olberding, d/b/a Vess Transfer Co. v. Illinois Central Railroad Co., Inc., 346 U.S. 338 (1953). The reasoning of these decisions led to an expansion of state power over non-residents limited only by the strictures of the due process clause.

2. DUE PROCESS LIMITATIONS

The power of a forum state to exercise personal jurisdiction over a non-resident is dependent on a decision by the non-resident to establish contact or conduct activity involving the forum state. Unless the non-resident has reason to know that contact or activity is being made with the forum state, due process considerations prevent the exercise of personal jurisdiction over him by that state. See, Hanson v. Denckla, 357 U.S. 235 (1958). The changes which have come about have not removed all restrictions on the state and there is still a need for certain minimal contacts between the state and the defendant. The United States Supreme Court has stated that whether due process has been satisfied depends on the quality and nature of the activity in relation to the

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fair and orderly administration of the laws which the due process clause is meant to insure. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The principle, because of its flexibility, is easy to state but difficult to apply.

The case of McGee v. International Life Insurance Co., 355 U.S. 220 (1957), attempted to review the evolution of jurisdictional theories to date and provide specific factors for consideration in the future. For the first time the court considered a controversy involving a non-resident whose only contacts with the forum state had taken place by mail. The insurance company had an insurance contract with a resident of California and personal jurisdiction was based on a California statute which declared such insurance companies subject to California jurisdiction even if not amenable to personal service in the state. As constitutional limitations would apply to this state statute as well as to Vermont's long-arm statute, the only legally significant difference is that the California statute applied only to insurance companies.

In its decision upholding the exercise of jurisdiction by the California court, the Supreme Court stated, "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state." Id. The substantial connections which the contract had with California included delivery of the contract in California, the mailing of premiums from that state, and the residence of the insured within the state. The court also indicated that California had a manifest interest in providing its residents with an effective means of redress against their insurers. The inconvenience imposed upon the insurance company was held not to amount to a denial of due process.

The Supreme Court soon warned that, despite McGee, the jurisdictional power of states over non-residents was still subject to territorial limitations.

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In Hanson v. Denckla, 357 U.S. 235 (1958), the Supreme Court found that a Florida court was not able to exercise personal jurisdiction over a Delaware Trust company. The trust instrument was executed by the settlor outside Florida and while the settlor resided outside Florida. Since establishing her residence in Florida, the settlor had received the income from the corpus and had executed an inter vivos appointment of beneficiaries. The Supreme Court failed to find the minimal contacts with Florida necessary to allow Florida courts to exercise personal jurisdiction over the defendants. The cause of action was held not to have arisen out of an act done or transaction consummated in Florida. McGee was distinguished on the basis that there the reinsurance agreement had been solicited by the non-resident insurance company, whereas Hanson was described as involving the validity of an agreement entered without any connection with the forum state.

Both McGee and Hanson were discussed in some detail by this court in Deveny v. Rheem Manufacturing Company, 319 F.2d 124 (1963). As this court noted "[t]he long arm of state courts is permitted to reach out-of-state defendants only in suits growing out of acts which have created contacts with the forum state, however limited or transient such contacts may be." Id. at 127. But this court also correctly noted that " [The Hanson] case in no sense can be taken as increasing the requirements which the court found to be satisfied in McGee." Id. at 128. Is the instant case controlled by McGee or by Hanson?

C. THE INSTANT CASE

The retiree was a resident of Vermont prior to retirement and at a time when he was still a salaried employee of Abex Corporation. Appendix p. 56. During this period the retiree continued to accrue retirement benefits and his total benefit rights became fixed only after he had established his residence in Vermont. The contract between the parties therefore became fixed and binding

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at a time when the employer knew of the Vermont connection and could foresee the future contacts with the state. This activity, unlike the activity involved in the Hanson case, would be of a systematic nature requiring continual contact with Vermont on a minimum basis of once a month. We therefore see that the instant case differs from Hanson in several important respects: The contact with the forum state was foreseeable by the defendant, and; the activity which gave rise to the cause of action was of a continuous and systematic nature and arose out of a transaction consummated in the forum state. Perhaps most importantly, the plaintiff in the instant case is the original party to the contract. Like McGee, where the suit was initiated by the successor of the deceased insured, the instant case involves an absent corporation who has knowingly contracted with a forum state resident. The Retirement Board knew that their actions would have a causative effect in Vermont. Cf., Miller v. Cousins Properties, Incorporated, 378 F.Supp. 711 (1974). The authority of McGee is compelling and requires a finding that the Retirement Board and Abex Corporation are subject to the jurisdiction of courts in Vermont. The contact with Vermont is sufficient to sustain jurisdiction, for as this court has noted: "It is impossible to imagine a case arising from a contract made by a foreign corporation with a resident of Vermont to be performed in whole or in part by either party in Vermont where contact with Vermont would not suffice to sustain jurisidction." Deveny v. Rheem Manufacturing Company, 319 F.2d 124, 128 (1963).

The retiree's situation differs from other retired employees of Abex Corporation in that he was employed by the corporation while residing in Vermont. This should not be dispositive of the case however, as the corporation could, or should, foresee contact with any of the fifty states. The essential factor found in Davis v. Saab-Scania of America, Inc., 133 Vt. 317 (1975), is still missing in such a situation. In the Davis case the Vermont Supreme Court

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found that the defendant could not foresee that the activity in Connecticut, which gave rise to the cause of action, would have a causative effect in Vermont. The Retirement Board, which administers the retirement plan for Abex Corporation, has continued contact with the former employees, and knows that their actions will have a causative effect wherever the retirees are domiciled.

A finding that the corporate defendant and its agent board were subject to the personal jurisdiction of any state wherein a retiree of Abex Corporation should reside would impose a burden on them. Like the McGee case however, this burden would not amount to a denial of due process and is minimal when compared to the burden which an opposite finding would place upon the retirees. If the fixed income retiree is compelled to travel to New York for redress, then the administrators of the retirement plan are in effect judgment proof for all but the most extreme abuses of their power. The interest which government has in protecting retirees is amply demonstrated by the enactment of the Welfare and Pension Plan Disclosure Act, 29 U.S.C. §§301 et seq. In setting forth the policy behind enactment of the statute, Congress noted that retirement plans affected the security and well-being of millions and was affected with a national public interest. More importantly, Congress noted that such plans had become an important factor in commerce because of the interstate character of their activities. 29 U.S.C. §301 (a). The interstate character of their activities gives rise to the foreseeable causative effect their actions have in other states.

It is not necessary that this court's decision extend to include all retirees however, as the special circumstances which are present in this case distinguish it from the normal situation and more readily allow a finding that those contacts, which are essential to the exercise of jurisdiction, are present and determinative here.

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D. SERVICE OF PROCESS

Service of process upon Abex Corporation, I.C. Industries, Inc., and the Retirement Board was accomplished in accordance with the procedure outlined by Vermont law for service upon foreign corporations. Personal service was made upon Donald K. Rennie, a member of the Retirement Board in New York State. It is clear that the Retirement Board is not an independent incorporated body and therefore the lower court felt that service in this manner was improper. Whether or not the manner of service was proper, it did fulfill the constitutional requirements of due process. It is essential to due process, that a party subjected to jurisdiction be given notice and an opportunity to be heard. Cf., Hess v. Pawloski, 274 U.S. 352 (1927); with, Wuchter v. Pizzutti, 276 U.S. 13 (1928).

The Retirement Board received notice by personal service upon an individual member of that board, Donald K. Rennie. Notice was also given to the Retirement Board by proper service upon their principal, Abex Corporation. The Retirement Board has therefore been given ample notice and opportunity to be heard. If the manner of service utilized on the Retirement Board was defective however, then the proper remedy would be to quash the original service and allow the complainant opportunity to perfect service.

It appears from the record that the Retirment Board was served in accordance with Vermont's long-arm statute. The Retirement Board is the agent created by Abex Corporation to administer the pension fund and is an integral part of the corporation. The members of the board are appointed by the Director's of Abex Corporation as are other officers of the corporation. The Retirement Board is therefore a part of the corporation and is simply a part of the organizational and administrative structure of the corporation. Service upon this part of the corporation is proper if in compliance with the procedure

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outlined for service upon corporations in general.

CONCLUSION

The plaintiff-aprellant is a retired employee of Abex Corporation who alleges that he has been damaged by the acts of Abex Corporation and its agent, the Retirement Board of the Retirement Plan of Salaried Employees of Abex Corporation. The activity engaged in by the Retirement Board is the administration of the plan and disbursement of benefits to retirees. This is the business in which the Retirement Board is engaged and their actions amount to doing business much in the same way as a manufacturer engages in business when he ships his products in interstate commerce. Prior to finalization of the terms of the agreement affecting the retiree, Abex Corporation and the Retirement Board knew that the retiree had established his residence in Vermont. The Retirement Board therefore knew that they would have to engage in activity which had substantial contact with Vermont in order to fulfill their duty.

This reasoning applies to the broader class which includes all the retired employees of Abex Corporation. The factors which were determinative in McGee v. International Life Insurance Co., 355 U.S. 220 (1957), are also present and controlling in this case. The contact with foreign states was foreseeable to the Retirement Board and the Retirement Plan was created with these probable contacts in mind. The burden placed on the Retirement Board by subjecting them to personal jurisdiction in these suits is minimal when compared to the burden which would otherwise be placed upon the retirees. The only effective way of providing redress to retirees and thereby ensuring that administrators will be subject to review is to recognize that the courts in the retirees' resident states have personal jurisdiction over the administrators. This court should find that the United States District Court for the District of Vermont

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has personal jurisdiction over Abex Corporation, the Retirement Board as agent and I.C. Industries, Inc., as parent company, and should reverse the order of dismissal below and remand the cause for further proceedings.

DATED at Poultney, County of Rutland and State of Vermont, this 30th day of April, 1976.

Richard J. Wright

Richard J. Wright, Esq.
A member of the firm
DeBonis and Wright, P.C.
25 Main Street
Poultney, Vermont 05764

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25 MAIN STREET
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PLAINTIFFS

Anderson, Kenneth A. of the Town of Poultney, County of Rutland and State of Vermont,

Closed

DEFENDANTS

Abex Corporation, of the City of New York, County of New York and State of New York; The Retirement Board of the Retirement Plan for Salaried Employees of said Abex Corporation; Donald K. Rennie, of the City of New York, County of New York and State of New York; Illinois Central Industries, Inc., of Chicago, County of Cook and State of Illinois

CAUSE

Contract - T29,USC,Sec.301 et seq. - Pltf. requests order that defts. comply with all secs. of Rules & Regulations of Retirement Plan.

ATTORNEYS

DeBonis & Wright, Esqs.
25 Main St., Poultney, Vt. 05764
287-9110

Stephen M. Schuster, Jr., Esq.
Samuelson, Bloomberg, Portnow,
Schuster & Lang, LTD.
117 St. Paul St.
Burlington, VT
862-6511

CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID			STATISTICAL CARDS	
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Civ. 75-166 Anderson vs. Abex Corp. et al

DATE	NR.	PROCEEDINGS
1975		
July 2	1	Filed Complaint.
" "		Issued Summons.
24		Issued Order for Notice and Proof of Delivery of Abex Corporation.
" "		" Order for Notice and Proof of Delivery of The Retirement Board of the Retirement Plan for Salaried Employees of Abex Corporation.
" "		" Order for Notice and Proof of Delivery of Donald K. Rennie.
" "		" Order for Notice and Proof of Delivery of Illinois Central Industries, Inc.
Aug. 21	2	Filed Summons and four order for notice and proof of delivery return served.
Sept. 5	3	" Notice of Appearance of Samuelson, Bloomberg, Portnow, Schust & Lang, Ltd. for defendants; defendants' motion to dismiss; Affidavit in support of motion to dismiss and Memorandum in support of motion to dismiss.
" 15	4	" Pltf's Certificate of Service.
" 16	5	Filed plaintiff's Memorandum of Law
Sept. 24	6.	Filed Notice of disqualification of Judge Coffrin.
" 29	7.	Filed Affidavit of Compliance with T 12 VSA § 855.
Nov. 7		In Court before Judge Holden. Joseph A. DeBonis, Esq. and Richard J. Wright, Esq. for plaintiffs. Stephen M. Schuster, Jr., Esq. for defendants.
" "		Hearing on defendants' Motion to dismiss.
" "		Statements made to Court by Mr. Schuster and Mr. Wright. Court makes inquiries of Mr. Wright.
"		Decision reserved.
Dec. 8	8.	Filed Memorandum and Order--that the motions of the defendants to dismiss the action for lack of personal jurisdiction are granted.
" 22	9	Filed Plaintiff's Motion for Relief from or Amendment of Judgment Order and Affidavit.
1976		
Jan. 5	10.	Filed Deft.'s Memorandum in Opposition to Plaintiff's Motion for Relief From or Amendment of Judgment.
" "	11.	" Plaintiff's Memorandum of Law.
" 22	12	" Plaintiff's Motion to Amend Complaint.
" "	13	" Plaintiff's Interrogatories to Defendant, Abex Corporation.
" "	14	" Plaintiff's Interrogatories to Defendant, Donald K. Rennie.
" "	15	" Plaintiff's Affidavit.
Jan. 23		In Court before Judge Holden. Mr. Kenneth A. Anderson present with his attys. Joseph A. DeBonis, Esq., Richard J. Wright, Esq. And Mr. Stephen M. Schuster, Jr. Esq., atty for deft.
" "		Hearing on Pltf's Motion for Relief from or Amendment of Judgment Ord
" "		Statements made to the Court by Mr. Wright in regards that Abex Corp. has construed business in VT, contray to an earlier hearing; also tha VT does have the jurisdiction to take action in this matter because Mr. Anderson is a resident. Mr. Wright wishes to have a wide range of discovery to disclose all the facts.
" "		Statements made by Mr. Schuster in reguards to Mr. Anderson as a employee of Abex, and a request for Mr. Anderson to take the stan Mr. Schuster claims their is two defts. Abex & Ret. Board. which would mean that venue would be lacking in this ct. because of

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 75-166
Anderson, Kenneth A et al	Abex Corporation, et al	PAGE 2 OF ____ PAGES

DATE	NR.	PROCEEDINGS
1976		
Jan. 23	✓	Matter taken into consideration.
" 30	16	Filed plaintiff's Memorandum.
" "	17	" Memorandum and Order--Motion of the Pltf for relief from judgment under F.R.Civ.P. 59 & 60(b) is denied. Mailed copy to attorneys.
Feb. 27	18	" Pltf's Notice of Appeal. Mailed copy to Atty. Schuster, Debonis & Wright, Judge, C.Reporter & ClerkApp
" "	19	" Bond for Costs in the sum of $250.00. Mailed copy to Atty. Schuster, Debonis & Wright, Judge Holden, Court Reporter Geo. LaVictoire and Clerk, U. S. Court of Appeals for the Second Circuit.

21

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

Kenneth A. Anderson, of the Town of Poultney, County of Rutland and State of Vermont, Plaintiff	§	
	§	Civil Action File No. 5-1
Vs.	§	
Abex Corporation, 530 Fifth Avenue, New York, N.Y. 10036; The Retirement Board of the Retirement Plan of the Employees of ABEX Corporation, 530 Fifth Avenue, New York, N.Y. 10036; Donald K. Rennie, 530 Fifth Ave., New York, N.Y. 10036; and Illinois Central Industries, Inc., 1 Illinois Center, 111 E. Wacker Drive, Chicago, Illinois 60601, Defendants	§	SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon DEBONIS & WRIGHT, p.c., Plaintiff's attorneys, whose address is 25 Main Street, Poultney, Vermont 05764, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court

Date: JUL 2 19[illegible]
BURLINGTON, VT

[Seal of Court]

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

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U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

Kenneth A. Anderson of the Town of Poultney, County of Rutland and State of Vermont, Plaintiff	§	CIVIL ACTION FILE NO. 75-166
vs.	§	
Abex Corporation, of the City of New York, County of New York and State of New York; The Retirement Board of the Retirement Plan for Salaried Employees of said Abex Corporation; Donald K. Rennie, of the City of New York, County of New York and State of New York; Illinois Central Industries, Inc., of Chicago, County of Cook and State of Illinois, Defendants	§	PLAINTIFF'S COMPLAINT

NOW COMES the Plaintiff, Kenneth A. Anderson, by and through his attorneys, DeBonis and Wright, p.c., and complains as follows:

COUNT I

1. The Plaintiff is a resident of the Town of Poultney, County of Rutland and State of Vermont.

2. The Defendant, Abex Corporation is a corporation organized under the laws of the State of Delaware with its principal place of business in New York City, New York. Defendant, The Retirement Board of the Retirement Plan for Salaried Employees of Abex Corporation, is the agent board appointed to administer

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the Retirement Plan by the Abex Corporation's Board of Directors, hereinafter referred to as the Retirement Board. The Retirement Plan for Salaried Employees of Abex Corporation is hereinafter referred to as Retirement Plan. Defendant, Illinois Central Industries, Inc., is a Corporation organized under the laws of Delaware and with its principal office in Chicago, Illinois. Defendant, Donald K. Rennie, is a Vice President of Abex Corporation, the member of the Retirement Board who administers The Retirement Plan on behalf of the Retirement Board, and a resident of Darien, State of Connecticut.

3. The Plaintiff is a resident of Vermont while all the defendants reside outside of Vermont.

4. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00).

5. The Plaintiff was employed by the Abex Corporation and its predecessor, American Brake Shoe Company, as a full time employee from 1944 to 1970 and retired from said Abex Corporation on April 1, 1971.

6. At the time the Plaintiff retired from Defendant, Abex Corporation, the Retirement Plan was in effect and Plaintiff was entitled to receive benefits in accordance with the Rules and Regulations of such Retirement Plan, a copy of which is attached and made a part hereof, as Exhibit A.

7. Prior to November of 1973, the Plaintiff was receiving a variable pension benefit from the Retirement Plan in accordance with his earlier election to convert from a fixed pension benefit. During November of 1973, Plaintiff filed a written application with the Retirement Board to convert

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a part of his variable pension benefit to a fixed one, pursuant to the rules and regulations of the Retirement Plan.

8. The Defendants, by and through their agents, servants and/or employees refused and neglected to convert Plaintiff's variable pension benefit to a fixed one at the end of November 1973 as required of them by the Rules and Regulations of the Retirement Plan. In violation of their duties, as imposed by the Rules and Regulations of the Retirement Plan, Defendants would only agree to the conversion at the end of December, 1973.

COUNT II

9. Plaintiff realleges the facts contained in paragraphs 1 through 8 above and incorporates them herein.

10. On or about May 8, 1974, the Defendants, by and through their agents, servants and/or employees, wrote to variable pensioners, including the Plaintiff, a copy of said letter is attached and made a part hereof as Exhibit B, of the Retirement Plan informing them that effective June 1, 1974, the assets of the "investment medium" for such variable pensioners were being transferred by the Retirement Board from the fund managed by Standard and Poors Inter-Capital, Inc., on behalf of the Retirement Board to the Illinois Central Industries, Inc. Employee Benefit Trust. Thereafter, the investment experience of said Illinois Central Industries, Inc. Employee Benefit Trust would determine the amount of monthly variable pension benefit to be paid each variable pensioner of the Retirement Plan. Defendant's action in transferring the assets of the "investment medium" to the Illinois Central Industries, Inc. Employee Benefit Trust fund was contrary to the provisions of Sections 5:2, 8:1 and 11:7 of the Rules and Regulations of the Retirement Plan. The Defendants thus violated their duties and obligations under said Rules and

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Regulations in that the assets were mingled with the already existing assets of the Illinois Central Industries, Inc. Employee Benefit Trust fund, a general trust, the assets of which were and are for the benefit of persons other than the employees as defined in said Rules and Regulations.

11. At the time the Plaintiff retired, a letter was sent to the Plaintiff on behalf of the Retirement Board stating that the assets of the "investment medium" for variable pensioners of such Retirement Plan would be invested in common stocks or securities convertible into common stocks. a copy of said letter is attached and made a part hereof as Exhibit C, Since this letter was addressed to retiring members of the Retirement Plan it presumably was sent to all other such retiring members. Thereafter, on or about May 8, 1974, a letter was sent by Donald K. Rennie on behalf of the Retirement Board informing variable pensioners, including the Plaintiff, of the transfer of assets as explained in Paragraph 10 above and stating that said assets would be invested in "several diversified equity portfolios." The Defendant, Illinois Central Industries, Inc. Employee Benefit Trust is in fact a general trust covering persons in other pension plans in addition to now managing the "investment medium" of the variable pensioners of the Retirement Plan. Furthermore, the investments of the Illinois Central Industries, Inc. Employee Benefit Trust contain substantial investments in other than common stocks or securities convertible into common stocks. Thus the Defendants breached their fiduciary duties and obligations by transferring the assets of the "investment medium" to the Illinois Central Industries, Inc. Employee Benefit Trust, a general trust.

12. As a result of the Defendants' breach of their duties and wrongful action, Plaintiff has been and continues to be injured.

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COUNT XXI

13. Plaintiff realleges the facts contained in paragraphs 1 through 12 above and incorporates them herein.

14. Plaintiff at numerous times since his retirement has requested information regarding both the Defendant Abex Corporation's Retirement Plans and Trusts and the Defendant Illinois Central Industries, Inc. Employee Benefit Trust and the retirement plans covered by it. Said Defendants' wilful refusal and failure, for more than thirty days, to provide Plaintiff with the information he requested is a violation of the duties and obligations imposed on them by Title 29 U.S.C. §301 et seq. and makes them liable in a sum imposed by the law from the date of said refusal or failure. The Defendants by such refusal and failure are also in violation of Section 6:7 of the Rules and Regulations of the Retirement Plan.

WHEREFORE, Plaintiff demands:

1. Judgment against the Defendants in an amount the Honorable Court deems proper interest to date of judgment;

2. Reasonable attorney's fees incurred in prosecuting this suit as provided for by Title 29 U.S.C. §301 et seq.;

3. Costs, interest and such other and further relief as the Honorable Court deems proper;

4. That, since the variable pension benefit of retired variable pensioners of the Retirement Plan was effectively terminated without their consent on June 1, 1974, as a result of the transfer of the assets of the "investment medium" for variable pensioners to the Illinois Central Industries, Inc., Employee Benefit Trust, a general fund, the Honorable Court order the Defendant

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Abex Corporation and the Retirement Board to offer the Plaintiff and all variable pensioners the option of taking a fixed pension (the amount to be computed as of the date they first elected a variable pension) retroactive to June 1, 1974, or, in the alternative, continuing to receive a variable pension from the Illinois Central Industries, Inc. Employee Benefit Trust. Further, that the Honorable Court order the Defendant Abex Corporation, the Retirement Board, and Illinois Central Industries, Inc. to comply with all Sections of the Rules and Regulations of the Retirement Plan;

5. That the Honorable Court order Defendants to provide Plaintiff with the information requested;

6. That the Honorable Court award Plaintiff judgment against the Defendants in the amount of $1,000,000.00 as exemplary damages;

7. For such further relief as the Honorable Court deems proper.

Dated at the Town of Poultney, County of Rutland and State of Vermont, this 24 day of June, 1975.

DeBonis & Wright, p.c.
Attorneys for Plaintiff
25 Main Street
Poultney, Vt. 05764

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ATTORNEYS AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

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RETIREMENT PLAN FOR SALARIED EMPLOYEES
OF
Abex Corporation
An IC Industries Company

Abex

530 FIFTH AVENUE, NEW YORK, N. Y. 10036
TEL: 212-697-7000

May 8, 1974

TO VARIABLE PENSIONERS:

The members of the Retirement Board of the "Retirement Plan for Salaried Employees of Abex Corporation" have met and, in accordance with the provisions of Section 11.2 of the "Plan", have designated the Illinois Central Industries, Inc. Employee Benefit Trust as the investment medium for determining the amount of variable pension payable from month to month.

The new investment medium is made up of several diversified equity portfolios each with its own professional investment manager and will replace the portfolio managed by the S & P Equity Services, Inc. Therefore, your pension will be based on a factor established by the joint performance of these several equity portfolios rather than the performance of one portfolio as in the past.

It is our sincere hope and intent that this change, which will become effective as of June 1, 1974, will be beneficial to you. Accordingly, the amount of the variable pension you will receive in July will reflect the experience of the new investment medium.

We recognize that some of our variable pensioners might have preferred continuation of the present investment medium and may therefore wish to utilize their rights to convert in whole or in part from the variable to fixed pensions. If so, we would like to remind them that under the provisions of the Plan the monthly amount of variable pension to be converted in a particular month into a fixed amount of pension is to be converted as of the close of such month. This means that if we receive a conversion election in May, for example, the experience in May of the designated investment medium will govern the amount to be converted and will be reflected in a fixed monthly pension starting with the check to be paid in June.

D. K. Rennie
Member - Retirement Board

RETIREMENT PLAN FOR SALARIED EMPLOYEES
OF
ABEX CORPORATION

SUBJECT: VARIABLE PENSIONS

To Retiring Members:

During your working years the Abex Retirement Plan protected your pension against loss of purchasing power resulting from any rise in the cost-of-living by basing your pension for all your years of service on your salary during the five consecutive calendar years producing the highest average in your last ten years of service.

Until quite recently pensions paid under most retirement plan were in the form of a fixed number of dollars per month, and Abex's Retirement Plan has been one of these. Experience has shown that such fixed payments have been in dollars of variable purchasing power, for if prices were rising the fixed income would buy less. Conversely, when prices go down, a fixed income will buy more.

Most economists agree that the general trend in prices in the future will continue to be upward, which presents the problem of how to protect income after retirement to meet changes in the cost-of-living. One method is to provide a variable pension option which increases or decreases the amount of pension a person receives from month to month in accordance with the rise or fall in income and market value of common stocks in a "variable fund". Studies have shown that in the past both the cost-of-living and stock prices have tended to increase though not always at the same time.

The Abex Retirement Plan for Salaried Employees provides for a variable pension, available at the option of the pensioner. The Retirement Board has selected Standard and Poor's/InterCapital Inc. (S&P Equity Services, Inc.) as the investment counselor for the investment of the "variable fund" in a portfolio of common stocks (or securities convertible into common stocks) with the aim of providing both income and long term appreciation in market value.

The amount of monthly pension of a person electing the variable pension will increase or decrease depending on the investment experience of this "variable fund" of common stocks. The exact amount of a variable pension is recalculated each month by comparing the results achieved during the preceding month by the "variable fund" with the regular interest rate used by the Retirement Plan, as explained in Section 11.4 of the Plan. Accordingly, the dollar amount of a variable pension will vary from month to month. As an example, if an employee elected to have $100 per month of his fixed pension invested in the "variable fund", the first month after he retires it might be $101, the next month $99, and the next month $100, etc.

In making your decision whether to elect a variable pension you must remember that while the objective is to provide pension payments which will tend to vary generally with the changes in the cost-of-living, there can be no assurance this will actually happen. However, as pointed out before, the experience of the past has shown a long term rising trend in both the cost-of-living and common stock prices. If you believe you can afford a reduction in the amount of your fixed pension in the event of falling stock market prices, then you may wish to convert all or a portion of your fixed pension into a variable one to provide a hedge against possible future rises in the cost-of-living if common stocks go up over the long term. Conversely, you may wish to have part of your pension paid in a fixed amount as a hedge against falling stock market prices.

Section 11.1 of the Plan spells out how the conversion from a fixed amount of pension to a variable pension is made in five steps three months apart, so as to average out the transfer to the "variable fund". You also have the right to convert back from a variable pension to a fixed pension, equal to the amount of your variable pension at that time. However, should you again wish to reconvert to a variable pension, you would again have to go through the five three-month investment steps.

You are <u>required</u> to complete an election form should you wish to convert all or part of your fixed pension into a variable pension. This election may be applied essentially to any form of retirement pension under the Plan, including pensions payable under a joint and survivor option. (See Section 11.1 of the Plan.)

For your convenience, the reverse side of this letter contains the complete provisions of Section 11, Variable Pensions. As this is a rather complicated subject, any questions you may have should be referred to the Secretary of the Retirement Board in New York.

D.K. Rennie

D.K. Rennie
Member - Retirement Board

SECTION 11. VARIABLE PENSIONS

11.1 A member retired on or after January 1, 1969 may elect at the time of retirement or thereafter to convert all or part of the fixed amount of normal, early or deferred pension otherwise payable on his account (including an optional pension under Section 3.7, but not a benefit to be adjusted under Section 4.3) into a variable pension, in five steps at three month intervals, as provided in Section 11.3. Such an election may be made by a contingent annuitant receiving fixed pension payments of an optional pension under Section 3.7 after such a member's death. A member or contingent annuitant receiving a variable pension may elect to convert all or part of the amount thereof into a fixed pension, in one step, as provided in Section 11.5.

11.2 Any election under this Section 11 shall be made by written application filed with the Retirement Board. The month in which the application is acted upon by the Board after having been received shall be the month of application for the purposes of Section 11.3. The application shall designate an investment medium, which shall have been authorized by the Board, for determining the amount of variable pension payable from month to month.

11.3 Of the total amount of fixed pension to be converted, one-fifth shall be converted as of the close of the month of application, one-fifth as of the close of the month three months after the month of application, one-fifth as of the close of the month six months after the month of application, one-fifth as of the close of the month nine months after the month of application and the balance as of the close of the month one year after the month of application. Any reduction for expenses in the amount of pension shall be made at the time of conversion.

11.4 The amount of variable pension payable from month to month after the month of conversion shall be varied as of the close of each month by multiplying the amount payable the preceding month by the ratio of (i) the result of an investment assuming it were made at the beginning of the month in the designated investment medium and increased or decreased by the medium's investment increment or decrement during the month (including realized or unrealized gains or losses as well as all dividend or other income) to (ii) the result of an investment made at the beginning of the month and increased at a standard rate of return of one-twelfth of 3-3/4%.

11.5 The monthly amount of variable pension to be converted in a particular month into a fixed amount of pension shall be converted as of the close of such month.

11.6 If a retired member's pension is to be discontinued because of restoration to service as an employee, any amount of variable pension shall be converted automatically under Section 11.5 into a fixed amount of pension for the purposes of Section 4.4.

11.7 The Retirement Board, by arrangement with the Trustee, shall keep invested in the designated investment medium so much of the assets of the Plan as the Board shall find appropriate from time to time to provide the actuarially computed reserves for the variable benefits payable under this Section 11.

RETIREMENT PLAN
FOR SALARIED EMPLOYEES OF
ABEX CORPORATION

SECTION 1. DEFINITIONS

1.1 "Plan" shall mean the Retirement Plan for Salaried Employees of Abex Corporation, as described herein or as hereafter amended.

1.2 "Company" shall mean Abex Corporation with respect to its employees; and any subsidiary company authorized by the Board of Directors to participate in the Plan, with respect to its employees.

1.3 "Board of Directors" shall mean the Board of Directors of Abex Corporation.

1.4 "Trustee" shall mean the trustee (or trustees) appointed by the Board of Directors to hold, invest and disburse the funds of the Plan.

1.5 "Retirement Board" shall mean the managing board of the Plan as provided in Section 6.

1.6 "Employee" shall mean any person employed by the Company who receives regular stated compensation from the Company, other than a pension, retainer, fee or other payment under contract. It shall not mean any employee working on a commission basis alone, or a temporary, probationary, contract or other special employee.

1.7 "Salaried employee" shall mean any employee regularly employed in the permanent, full time salaried classifications of the Company who is not in a collective bargaining unit. An "hourly employee" shall mean any employee who is not a salaried employee. Salaried or hourly employment shall refer to employment while a salaried or hourly employee, as the case may be.

1.8 "Member" shall mean any person included in the membership of the Plan as provided in Section 2.

1.9 "Salary" shall mean in case of retirement or entitlement to a disability pension on or after January 1, 1969 all compensation with respect to a calendar year paid to an employee for either salaried or hourly employment; provided that bonus payments shall be included in compensation for the calendar year next preceding the year of payment and further provided that any bonus payments made after the year of retirement or entitlement to a disability pension shall not be included in compensation for the purposes of the Plan.

1.10 "Average final salary" shall mean the average annual salary of a member in the five consecutive calendar years giving the highest average during the last ten calendar years of his continuous service to his last day worked, or during all of the calendar years in such continuous service if less

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than five years, provided that if the salary in any part of such continuous service is less than full time salary, it shall be increased to full time salary for the purpose of computing average final salary.

1.11 "Continuous service" shall mean the period beginning with the employee's last date of hire by the Company or Abex Industries of Canada, Ltd. (or a predecessor company if approved by the Board of Directors), and prior to retirement or earlier termination of employment, less any period of absence during which the employee was in receipt of a disability pension under any retirement plan of the Company; provided that in no event shall the portion of a continuous absence in excess of two years from the date last worked count as continuous service unless in case of absence for military service from which the employee shall have returned with re-employment rights under the law. The accumulation of continuous service except for determining eligibility for benefits shall be suspended if a member shall be transferred to hourly employment, but the suspension shall be removed if he shall again become a salaried employee within one year or if, after continuous hourly employment of more than one year, he shall have been a salaried employee for a continuous period of two years prior to his normal retirement date; provided that the benefits of any member retiring under this Plan while a salaried employee shall not thereby be less than if he had retired as an hourly employee also entitled to retire under another retirement plan of the Company. Continuous service shall be figured to the nearest month disregarding any fractional part of a month of less than 15 days.

1.12 "Normal retirement date" shall mean the first day of the calendar month next following the 65th anniversary of birth.

1.13 "Pension" shall mean payments for life payable under the Plan subject to the provisions of Section 4.

1.14 "Equivalent actuarial value" shall mean equivalent value when computed on the basis of the rate or rates of interest and tables adopted from time to time by the Retirement Board for this purpose.

1.15 "Retirement System" shall mean the Employees' Retirement System of American Brake Shoe Company, the salaried employees' pension benefits of which were merged into this Plan as of January 1, 1963.

1.16 The masculine pronoun whenever used shall include the feminine pronoun.

SECTION 2. MEMBERSHIP

2.1 Every salaried employee shall be a member of this Plan, except that an employee not a member who shall be transferred from hourly to salaried employment shall not become a member until he shall have been a salaried employee for a continuous period of two years prior to his normal retirement date.

2.2 A member shall cease to be a member if and only if he shall cease to be an employee for a reason other than retirement under the Plan or payment of a disability pension, except that if he will be entitled to a deferred early or vested pension after attainment of age 65, he shall continue to be a member.

2.3 Notwithstanding the provisions of Section 2.2, if any salaried employee of the Company shall have been transferred to the employ of the Association of Manufacturers of Chilled Car Wheels, and shall have returned to the employ of the Company without intervening employment elsewhere (other than in the service of the United States during a furlough from the Association), his service with the Association shall be treated as service with the Company.

SECTION 3. BENEFITS

3.1 Normal Retirement

3.11 A member shall be retired by the Retirement Board on his normal date, except that upon the approval of an authorized official of the Company a member so desiring may be retained in active service after his normal retirement date for a period of one year as the result of each such approval. Notwithstanding the extension of member's service, such a member shall, during such extension, be retired on the first day of the calendar month next following written application to the Board made by the member or the Company.

3.12 Upon retirement of a member on or after his normal retirement date, and on or after July 1, 1970 but not if preceded by a disability pension awarded prior to July 1, 1970, a member shall receive a normal pension as defined in this Section 3.12 commencing on the last day of the calendar month of retirement.

The normal pension per annum shall equal 3/4 of 1% of the portion of the member's average final salary per annum not in excess of $6,600, plus 1¼% of any excess portion of such average final salary, multiplied by the number of years of his continuous service; provided that if the member shall have completed 15 or more years of continuous service, such pension per annum shall be not less than $72.00 multiplied by the number of years of his continuous service.

3.13 If a member's average final salary on his normal retirement date or on any anniversary thereof shall be in excess of $20,000, the pension payable to him under this Plan upon subsequent retirement shall be computed as though he had retired on his normal retirement date, or, if later, the anniversary thereof on which his average final salary first exceeded $20,000.

3.2 Disability Pensions

3.21 A member in service (including approved leave of absence or

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layoff) who shall become permanently disabled through some unavoidable cause and who shall have completed 15 or more years of continuous service shall be entitled to a disability pension, payable monthly on the last day of each month commencing with the month following the date the pension is awarded by the Retirement Board, provided the written application is received by the Board within two years from the date last worked and subject to the following conditions:

(i) A member shall be deemed by the Retirement Board to be permanently disabled only if he is totally and presumably permanently disabled by bodily injury or disease so as to be prevented thereby from engaging in any occupation or employment for remuneration, gain or profit, and if such disability shall have continued for six consecutive months and in the opinion of a qualified physician will be permanent, continuous and total during the remainder of his life.

(ii) The disability shall be deemed by the Retirement Board to have resulted from an unavoidable cause unless it shall have been contracted, suffered or incurred while engaged in, or resulted directly or indirectly from having engaged in, a criminal enterprise, or from addiction to narcotics, or from intentionally self-inflicted injury, or from service after January 1, 1963 in the Armed Forces of the United States for which a military pension shall be payable.

3.22 The disability pension per annum shall be payable to the member's normal retirement date (subject to Section 3.23) and shall be computed in the same manner as a normal pension; provided, however, that if at the time the pension is awarded by the Retirement Board he is unable to qualify for disability insurance benefits under Title II of the Social Security Act because he is not disabled for the purposes of the Act, such amount of disability pension shall equal 1¼% of his average final salary, or $108.00 if greater, multiplied by the number of years of his continuous service.

In no event shall the amount of such disability pension per annum be less than $1,200 when taken with the disability insurance benefit, if any, for which the member is able to qualify under Title II of the Social Security Act on the basis of prompt application therefor.

3.23 Once each year the Retirement Board may require any member receiving a disability pension (who has not reached his normal retirement date) to undergo a complete and unprivileged medical examination by a physician or physicians designated by the Retirement Board, such examination to be made at the place of residence of such member or other place mutually agreed upon. Should any such member refuse to submit to such medical examination, his disability pension shall be discontinued until his withdrawal of such refusal, and should this refusal continue for a year all rights in and to his disability pension shall cease. If the Retirement Board shall find from such medical examination or otherwise that the disability of a member receiving a disability pension has been removed and that he has regained his earning capacity, in whole or in part, his disability pension shall terminate.

3.24 When a member receiving a disability pension reaches his normal retirement date, his disability pension shall terminate and he shall be entitled to retire on a normal pension computed as provided in Section 3.1 as in effect when his disability pension was awarded.

3.3 Early Retirement

3.31 A member in the active service of the Company who shall have completed 15 or more years of continuous service and shall have reached his 60th anniversary of birth but not his normal retirement date shall be eligible at his option for retirement on the first day of the calendar month next following written application to the Retirement Board, and shall be entitled to an immediate early pension, commencing on the last day of the month of retirement, the amount of which shall be computed (under the provisions of the Plan as in effect on his last day worked) in the same manner as a normal pension, reduced by 5/9 of 1% for each month from the date of early retirement to normal retirement date.

3.32 A member who on or after July 1, 1970 shall not have reached his normal retirement date but whose combined years of age and continuous service when computed to exact days shall equal 75 or more provided he shall have completed 15 or more years of continuous service, and who

(i) shall have been laid off or continuously disabled for two years, provided he needed not more than two years of age and not more than two years of continuous service since the commencement of such layoff or disability in order to meet the aforesaid age and service requirements, or

(ii) shall have his employment with the Company and all subsidiary or affiliated companies terminated by action of the Company other than for dishonesty involving Company funds or for the unauthorized disclosure of confidential information relating to the Company, or

(iii) being laid off, shall be deemed by the Company to have little likelihood of being recalled to work,

shall be eligible at his option for retirement on the first day of the calendar month next following written application to the Retirement Board, and shall be entitled to an early pension computed (under the provisions of the Plan as in effect on his last day worked) in the same manner as a normal pension and commencing on the last day of the calendar month of retirement; provided, however, that if at the time of retirement he is or will be unable to qualify for disability insurance benefits under Title II of the Social Security Act because he will not be disabled for the purposes of the Act notwithstanding six consecutive months of disability, such amount of early pension payable before his normal retirement date shall equal 1¼% of his average final salary, or $108.00 if greater, multiplied by the number of years of his continuous service.

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3.33 A member in the active service of the Company who on or after July 1, 1970 shall have completed 30 or more years of continuous service and shall have reached his 60th anniversary of birth but not his normal retirement date shall be eligible at his option for retirement on the first day of the calendar month next following written application to the Retirement Board, and shall be entitled to an early pension computed (under the provisions of the Plan as in effect on his last day worked) in the same manner as a normal pension and commencing on the last day of the calendar month of retirement; provided, however, that if at the time of retirement he is or will be unable to qualify for disability insurance benefits under Title II of the Social Security Act because he will not be disabled for the purposes of the Act notwithstanding six consecutive months of disability, such amount of early pension payable before his normal retirement date shall equal 1¼% of his average final salary, or $108.00 if greater, multiplied by the number of years of his continuous service.

3.34 A member in the active service of the Company who on or after July 1, 1970 would in the future, but prior to his normal retirement date, first meet the requirements of 30 or more years of continuous service and attainment of his 60th anniversary of birth, and whose combined years of age and continuous service when computed to exact days shall equal 75 or more, shall be eligible at his option for retirement on the first day of the calendar month next following written application to the Retirement Board, and shall be entitled to an immediate early pension, commencing on the last day of the month of retirement the amount of which shall be computed (under the provisions of the Plan as in effect on his last day worked) in the same manner as a normal pension, reduced by ½ of 1% for each month from the date of retirement to the first day of the calendar month on or after which he would have, with further continuous service, completed 30 or more years of continuous service and reached his 60th anniversary of birth; provided, however, that if at the time of retirement he is or will be unable to qualify for disability insurance benefits under Title II of the Social Security Act because he will not be disabled for the purposes of the Act notwithstanding six consecutive months of disability, such amount of early pension payable before his normal retirement date shall equal 1¼% of his average final salary, or $108.00 if greater, multiplied by the number of years of his continuous service, reduced by ½ of 1% for each month from the date of retirement to the first day of the calendar month on or after which he would have, with further continuous service, completed 30 or more years of continuous service and reached his 60th anniversary of birth.

3.4 Deferred Vested Pensions

3.41 A member not otherwise entitled to retire under the Plan who at termination of employment, or, if earlier, the end of the two-year period from the last day worked, on or after January 1, 1966 shall have completed 15 or more years of continuous service and shall have reached the 40th anniversary of his birth, shall be continued as a member but with continuous service credit only to termination of employment (or, if earlier, the end of

such two-year period) and shall be entitled to retire on his normal retirement date or on the first day of the calendar month next following written application to the Retirement Board, whichever shall be later, on a deferred vested pension computed (under the provisions of the Plan as in effect at termination of employment or, if earlier, the end of such two-year period) in the same manner as a normal pension, subject to the conditions of Section 3.42, and commencing on the last day of the calendar month of retirement.

3.42 Application for the deferred vested pension must be filed with the Retirement Board by the member not earlier than 90 days prior to his normal retirement date and not after the later of the 70th anniversary of his birth or five years from the mailing on or after his normal retirement date of written notice to his last known address, otherwise no deferred benefit shall be payable to him at any time.

3.43 Notwithstanding the foregoing provisions of this Section 3.4, a member who would be eligible for a deferred vested pension upon qualifying as provided in Section 3.41 and who shall have reached the 60th anniversary of his birth but not his normal retirement date shall be entitled to retire on the first day of the calendar month next following written application to the Retirement Board, on a deferred vested pension, commencing on the last day of the calendar month of retirement, which shall be equal to the deferred vested pension otherwise payable as provided in Section 3.41 reduced by 5/9 of 1% for each month from the date of retirement to normal retirement date.

3.44 Neither entitlement to a deferred vested pension nor receipt of a deferred vested pension by a retired member shall classify the member as an employee retired from the service of the Company, as referred to in any other plan of the Company except another retirement plan of the Company or a predecessor or subsidiary company.

3.5 Deductions

The amount of monthly retirement or disability pension payable to any retired member or disability pensioner shall be reduced by the entire amount of his public benefits (not benefits under Title I nor the old age or disability insurance benefits under Title II of the Social Security Act now in effect or as hereafter amended), and by that portion of any other benefits not attributable to his contributions.

(i) The term "public benefits" means the payments which a retired member or disability pensioner shall receive as a pension or would be entitled to receive (excluding any payments for his spouse and dependents) under any present or future law of the United States of America (excluding any benefits under Title I and the old age or disability insurance benefits under Title II of the Social Security Act now in effect or as hereafter amended), or of any state, district, territory or subdivision thereof, irrespective of any factor which may disqualify him or diminish such payments, such as, but not limited to, his engaging in employment or failing to make proper application. As used herein, the term "public benefits" shall not include a pension

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granted for or on account of military or other governmental service or any payments under any state law approved pursuant to Title I of the Social Security Act, as amended, or any payments under any Workmen's Compensation law, occupational law or similar law payable to a disability pensioner hereunder prior to the attainment of age 65.

(ii) The term "other benefits" means any discharge allowance, severance allowance, pension, disability income or benefit of any kind (which is not a public benefit nor specifically excluded therefrom as that term is above defined) payable with respect to any period of continuous service used for computing the amount of benefit under this Plan, and in respect of which the Company or a predecessor or subsidiary company shall have contributed under any plan of the Company or a predecessor or a subsidiary company or by reason of any law of the United States or of any state, district, territory, or subdivision thereof, or any other payment which a pensioner receives or would be entitled to receive irrespective of any factor which may disqualify him or diminish his other benefits, such as, but not limited to, failing to make proper application.

(iii) Any reduction in pensions under this Plan by new public benefits, or future increases in public benefits (not Workmen's Compensation), shall be reported to the Internal Revenue Service for its determination of the continued qualification of the Plan as a qualified pension trust under the Internal Revenue Code.

3.6 Payments at Death

3.61 Upon the death of a member retired on or after November 1, 1968 on a normal or early pension or optional form thereof (including a member not yet retired though eligible for retirement whose employment shall have terminated on or after November 1, 1968, but in no case a member receiving a disability pension, nor a member eligible for a deferred vested pension either before or after commencement thereof) who was insured for life insurance under the Company's Group Insurance Plan immediately prior to his retirement or termination of employment and who shall have completed 15 or more years of continuous service, a death benefit of $2,000 shall be payable to the member's beneficiary, if any, nominated by written designation filed with the Retirement Board, otherwise to the member's estate.

3.62 In no event shall any such death benefit be payable if the member's active service life insurance under the Company's Group Insurance Plan is payable.

3.7 Optional Forms of Pension

3.71 Until the first payment on account of a normal, early or deferred pension becomes due, the member may elect to convert the pension otherwise payable on his account into an optional benefit, in accordance with one of the optional forms named below, by written application filed with the Retirement Board.

3.72 The election of an optional benefit shall become effective on the member's retirement date, or, if requested in the election, a specified date prior to retirement which shall not be before the earliest of (i) the member's completion of 30 or more years of continuous service and attainment of his 60th anniversary of birth, (ii) his termination of employment prior to his normal retirement date with entitlement to retire (though not retired) on an early pension, or (iii) his normal retirement date, provided in any case the election either shall be accompanied by evidence of the member's good health satisfactory to the Retirement Board or shall have been on file with the Board at least 60 days prior to such effective date; otherwise any pension payments falling due prior to the 60th day after the filing of the election shall be in the amount payable without optional modification, and if the member shall be living on such 60th day, the election shall thereupon become effective.

3.73 The amount payable under an option becoming effective on or after July 1, 1969 shall be computed to be of equivalent actuarial value as of the time the election shall become effective or, if later, the date of retirement, except that if the election shall become effective and the member shall die prior to his retirement, the amount payable under the option shall be computed as though he had retired on the first day of the month of his death.

3.74 The election of Option A or Option B may be revoked by the member only by written notice received by the Retirement Board at least 60 days prior to the time it would otherwise become effective, or during such 60 day period upon evidence of the good health of the contingent annuitant satisfactory to the Board, but in no case shall the consent of the contingent annuitant be required. If the member, or the contingent annuitant under Option A or Option B, shall die before the election shall have become effective, the election shall thereby be cancelled automatically. Appropriate, similar conditions respecting the election of Option C shall be set forth in the election as approved by the Retirement Board.

Option A. A reduced pension payable during the retired member's life, with the provision that after his death it shall continue during the life of and shall be paid to the contingent annuitant nominated under the option at the time of the election.

Option B. A reduced pension payable during the retired member's life, with the provision that after his death a pension at one-half of the rate of his reduced pension shall be continued during the life of and shall be paid to the contingent annuitant nominated under the option at the time of the election.

Option C. A reduced pension payable during the retired member's life under some other form of joint and survivor pension, with or without payments certain but for not more than his life expectancy, with any balance payable at the death of the retired member or joint annuitant to be settled in a lump sum; provided that the benefits shall be approved by the Retirement Board.

3.8 Predecessor Plans and Benefits

3.81 In addition to the benefits otherwise provided under this Plan

there shall be payable under the Plan any amounts due members in settlement of previous interests under any retirement, pension or other plan (herein referred to as a predecessor plan) which shall have been combined with and its assets merged into a retirement plan of the Company to the extent such amounts exceed the benefits otherwise provided under this Plan or any other retirement plan of the Company and represent, as the case may be,

(i) the return of employee contributions upon death or after retirement or upon termination of employment prior to retirement, including interest credits at the rate last in use under the predecessor plan (unless a different rate or rates shall be adopted by the Retirement Board) to the time of retirement or earlier death or termination of employment, or

(ii) interests in benefits provided by employer contributions to the extent vested at the time of inclusion of the predecessor plan in a retirement plan of the Company, as determined by and subject to the vesting provisions in the predecessor plan.

The benefits payable under this Section 3.8 when taken with any benefits otherwise provided under this Plan by the Company's contribution shall, in the event of termination of this Plan, be subject to any limitations affecting highly paid employees that would have applied had the predecessor plan continued unchanged.

3.82 All pensions, annuities or similar benefits provided by employee or employer contributions which shall have commenced prior to January 1, 1966, under this Plan, or any other retirement plan of the Company with respect to salaried employees, including normal pensions commencing on or after that date if preceded by disability pensions awarded prior to that date and deferred pensions the deferred right to which shall have been established by termination of service or retirement prior to that date, shall be continued by the Retirement Board pursuant to the provisions of this Plan as in effect at the time of retirement and the provisions of the Retirement System as in effect immediately prior to January 1, 1963.

3.83 Provision for benefits payable under this Section 3.8 may be made at the direction of the Company by a life insurance company contract or contracts held by the Trustee.

SECTION 4. PAYMENT OF PENSIONS

4.1 All pensions shall be payable monthly for life commencing as specified in Section 3, and continuing to be payable on the last day of each calendar month thereafter to and including the calendar month of death, subject to the conditions of this Section 4.

4.2 If an optional benefit has been elected, the provisions of Section 3.7 shall apply.

4.3 The Retirement Board shall adopt such procedures as it shall find

convenient for the payment of pensions quarterly, semi-annually or annually in advance, or in a lump sum of equivalent actuarial value, in case of monthly payments of less than $10.00 and for the payment of amounts of pensions of equivalent actuarial value to provide combined retirement income in the same amount before and after the commencement of Social Security benefits.

4.4 If a member receiving a pension shall be restored to service as an employee not on a temporary basis, his pension shall be discontinued, and his continuous service to the time of his previous retirement shall be restored to him. If he shall have elected an optional benefit, the following shall apply:

(i) If restoration to service shall be prior to the member's normal retirement date, and if at the time of restoration he shall not have completed 30 or more years of continuous service and reached his 60th anniversary of birth, the election shall continue as an election on file with the Retirement Board, but with no payment due under the option in the event of the death of the member or contingent annuitant before any of (a) the member's completion of 30 or more years of continuous service and attainment of his 60th anniversary of birth, (b) his termination of employment prior to his normal retirement date with entitlement to retire (though not retired) on an early pension, or (c) his normal retirement date.

(ii) If restoration to service shall be on or after the member's normal retirement date, or if at the time of restoration he shall have completed 30 or more years of service and reached his 60th anniversary of birth, the election shall continue in effect in accordance with the provisions of Section 3.7.

Upon the member's subsequent retirement, if he shall still be a member, his pension shall be recomputed on the basis of salary and continuous service before he first retired and after restoration to service as an employee (subject, however, to all of the provisions of Section 3), but if he shall have received reduced pension payments prior to his normal retirement date under Section 3.31, Section 3.34 or Section 3.43, the amount of such recomputed pension (prior to any optional modification) shall be reduced by the equivalent actuarial value of such pension payments he received (or, if he elected an optional benefit, the pension payments he would have received had he not elected an option) prior to his normal retirement date during his prior retirement; provided that in no case shall the recomputed pension be less than the pension previously payable (such pension being computed prior to any optional modification).

4.5 If the Company shall find that any retired member receiving a pension, or any former employee not retired under the Plan but entitled to retire on an immediate pension upon filing application therefor, shall be engaged or employed in any occupation in competition with the Company, and if, after due notice served by the Company on him and the Retirement Board, he shall continue in such occupation beyond such reasonable period as shall have been specified in the notice, the Board shall discontinue any

pension payments, and cancel any pension or right to retire, and the election of an optional form of pension, if one shall have been elected, shall be of no further effect.

SECTION 5. FINANCING THE PLAN

5.1 All contributions to provide the benefits under the Plan shall be made by the Company, but subject to the provisions of this Section 5. The regular contributions of the Company shall consist of normal contributions computed as a percentage of the salary of members to cover the cost of benefits currently accruing under the Plan, and of past service contributions towards the liquidation of any unpaid cost on account of past service benefits as determined by the Company. The Company, however, may for any reason modify the method of making contributions, or may suspend or discontinue contributions in whole or in part, subject to the provisions of Section 8.2.

5.2 All of the assets of the Plan shall be held by a Trustee (or Trustees) appointed from time to time by the Board of Directors, in trust under a trust instrument for use in providing the benefits under the Plan and paying such expenses as shall not be paid directly by the Company. The selection or removal of the Trustee and the terms of the trust instrument and any amendment thereof shall be in the sole determination of the Board of Directors. In no event, however, shall any part of the corpus or income of the trust be used for, or diverted to, purposes other than for the exclusive benefit of the employees or former employees. No person shall have any interest in or right to any part of the earnings of the trust, or any rights in, or to, or under the trust or any part of the assets thereof, except as and to the extent expressly provided in the Plan and the trust instrument.

5.3 The Company itself shall have no liability to pay the benefits under the Plan except as may be required under the provisions of Section 8.2, and any benefits shall be payable only from the assets held by the Trustee.

SECTION 6. ADMINISTRATION

6.1 The administration of the Plan and the responsibility for carrying out its provisions shall be vested in a Retirement Board appointed from time to time by the Board of Directors. The Retirement Board shall conduct its business and hold meetings as determined by it from time to time. A majority of the members of the Retirement Board shall constitute a quorum with power to act, and the concurrence of any member may be by telegram, cablegram or letter.

6.2 In the administration of the Plan, the Retirement Board may, from time to time, employ agents and delegate to them such ministerial and limited discretionary duties as it may see fit and may, from time to time, consult with counsel.

6.3 The Retirement Board shall elect a Chairman, who shall be a member of the Board, and a Secretary, who may or may not be a member of the Board, and shall appoint such Committees as it shall deem necessary and appropriate.

6.4 The members of the Retirement Board shall serve as such without compensation, but may be reimbursed for any necessary expenditures incurred in service on the Board.

6.5 The compensation of all officers, employees, agents, actuaries or counsel of the Retirement Board shall be approved by the Board and paid out of the funds of the Plan unless paid by the Company.

6.6 The Retirement Board shall keep in convenient form such data as shall be necessary for actuarial valuations of the various funds of the Plan and for checking the experience of the Retirement Plan.

6.7 The Retirement Board shall keep a record of all of its proceedings, which shall be open to inspection by the Board of Directors. It shall prepare annually a report showing the fiscal transactions of the Plan for the preceding year, the amount of accumulated cash and securities of the Plan and the last balance sheet showing the financial condition by means of an actuarial valuation of the assets and liabilities thereof. The Retirement Board shall make a copy of such report available for review by any member.

6.8 The Board of Directors shall appoint an actuary to serve at its pleasure, who shall be the technical advisor to the Retirement Board on matters regarding the operation of the Plan, and who shall perform such other duties as are required in connection therewith.

6.9 On the basis of such tables as the Retirement Board shall adopt, the actuary shall make an annual valuation of the liabilities of the Plan.

6.10 Except as herein otherwise expressly provided, the Retirement Board shall have the exclusive right to interpret the Plan and to determine any question under or in connection with the Plan and its decision or action in respect thereof shall be conclusive and binding upon all persons having any interest in the Plan.

6.11 None of the members of the Retirement Board, its officers or agents, shall, in the absence of bad faith or gross negligence, incur or suffer any liability or responsibility to the Company or any member of the Plan or beneficiary, or to any other member of the Board, as a result of the exercise of any power under the Plan or of any action taken or not taken, or as a result of any error of judgment; and the Company hereby indemnifies the Board and each of its members, its officers or agents, against any loss, liability or expense incurred, in the absence of bad faith or gross negligence, arising out of or in connection with the administration of the Plan, including the cost and expense of defense against any claim or liability.

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SECTION 7. NON-ALIENATION OF BENEFITS AND OTHER LIMITATIONS

7.1 The provisions of this Section 7 shall apply in all cases, anything in the Plan to the contrary notwithstanding.

7.2 Assignment of benefits under the Plan, or their pledge or encumbrance of any kind, shall not be permitted or recognized under any circumstances, nor shall benefits under the Plan be subject to attachment or other legal process for debts of any active or retired member or contingent annuitant or any other beneficiary, and upon notice of any attempted assignment or attachment of any kind, the benefit shall terminate as to the member, contingent annuitant or other beneficiary and shall be applied by the Retirement Board for his benefit or shall be paid to his spouse, children of other dependents, or any of them in shares, as the Retirement Board shall determine. However, a retired member may authorize the deduction of premiums for health insurance.

7.3 This Section 7.3 shall apply to any of the 25 highest paid employees of any Company on the effective date of its participation in the Plan or on the effective date of any subsequent amendment to the Plan whose pension, or anticipated pension at normal retirement date, shall exceed $1,500 per annum. If the Plan should be terminated within 10 years after any such effective date, the amount of the pension under this Plan of any of the aforesaid employees shall be reduced if and to the extent necessary in order that the amount of the pension shall not be greater than the amount provided by the largest of the following:

(i) The Company's contributions (or funds attributable thereto) which would have been applied to provide the pension in the event this Plan and the Retirement System, if and as in effect on the day before such effective date, had been continued without change.

(ii) $20,000.

(iii) The sum of (A) the Company's contributions (or funds attributable thereto) which would have been applied to provide the pension under this Plan and the Retirement System, if and as in effect on the day before such effective date, had been terminated, plus (B) an amount computed by multiplying $10,000 or 20% of the average annual remuneration of such employee during the last five years of service, whichever is less, by the number of years since such effective date.

If at any time during the first 10 years after any such effective date the full current costs under the Plan shall not have been met, then the amount of the pension which shall be payable thereafter to any of the aforesaid employees until such costs have been met shall not exceed the amount thereof that would have been payable had the Plan been terminated when such costs were not met, together with a supplemental payment from

the Plan to the extent that the aggregate of such supplemental payments to all such employees in any calendar year shall not exceed the aggregate of the Company's contributions already made to the Plan in such year. If at the end of such first 10 years the full current costs are not met, the restrictions shall continue to apply until the full current costs are funded for the first time thereafter. The full current costs under the Plan shall be deemed to have been met as long as the unfunded costs of the Plan shall not exceed the amount of unfunded cost at the inception of the Plan plus the amount of increase in unfunded cost on the date of each amendment made thereafter. Any excess reserves arising by application of this Section 7.3 shall be applied for the benefit of other active and retired members in accordance with the Plan.

References to pensions in this Section 7.3 other than as a rate per annum shall include any special retirement payment.

7.4 The establishment of the Plan shall not be construed as conferring any legal rights upon any employee or other person for a continuation of employment, nor shall it interfere with the right of the Company to discharge any employee and to treat him without regard to the effect which such treatment might have upon him as a member of the Plan.

7.5 The provisions of the Plan shall be construed and enforced according to the laws of the State of New York.

SECTION 8. AMENDMENT AND TERMINATION

8.1 The Plan may be modified or amended at any time and from time to time for any reason by action of the Board of Directors; provided, however, that no modification or amendment may be made which by reason thereof would deprive any person without his consent of any benefits to which he would otherwise be entitled by reason of the accumulated reserves accrued on his account, or of any benefits to which he would be entitled by reason of the provisions of Section 8.2 as in effect May 1, 1968; nor may any modification or amendment be made which by reason thereof would divert any of the assets of the Plan to any use other than for the exclusive benefit of employees or former employees. The Board of Directors may terminate the Plan at any time for any reason, in which event the assets of the Plan shall be applied as provided in Section 8.2.

8.2 Upon termination of the Plan or complete discontinuance of contributions under the Plan having the effect of terminating the Plan, the assets shall be used for the exclusive benefit of employees and former employees as provided in this Section 8.2. The assets, after provisions for expenses, shall be allocated by the Retirement Board on the basis of actuarial valuation to provide shares equal to the reserves computed to be required for benefits, in the order of preference set forth below; provided that if the Plan shall have been merged with another plan after May 1, 1968, there shall be a prior application of such order of preference for so much of the shares that would

have been provided employees and former employees under this Plan if it had been terminated with respect to all employees immediately prior to such merger.

First, the reserves for the benefits of members who shall have retired or reached their normal retirement dates, and of contingent annuitants receiving benefits;

Second, the reserves for the immediate, unreduced benefits, computed as though payable under Section 3.32, of members not included in First above who shall have completed 15 or more years of continuous service and whose combined years of age and continuous service when computed to exact days shall equal 75 or more;

Third, the reserves for the benefits, computed as provided in Section 3.41 and deferred to commence at normal retirement date, of members who are employees and who shall have completed 15 or more years of continuous service and reached the 40th anniversary of birth;

Fourth, the reserves for the benefits deferred to commence at normal retirement date of former employees who are being continued as members under the provisions of Section 3.41 and have not reached their normal retirement dates;

Fifth, the reserves for the benefit credits of all other members computed in the same manner as a normal pension and deferred to commence at normal retirement date.

The aforesaid reserves, including the reserves for benefits deferred to commence at normal retirement date, shall be computed on the basis of interest and mortality rates alone. If, after provision for the reserves in all higher orders of preference, the remaining assets shall be insufficient to provide in full for the reserves in the next order of preference, the shares in such next order of preference shall be reduced proportionately, and no shares shall be allocated under any lower order of preference; provided that if, in case of termination of the Plan for any reason with respect to all employees, the assets shall be insufficient to provide the full, unreduced shares through Third, the Company shall contribute to the Plan the amount required to provide all such shares in full through Third. If the assets shall be more than sufficient to provide in full for the reserves in all orders of preference, all shares shall be increased proportionately. Shares shall be payable in cash, or shall be applied to provide immediate or deferred annuities or other periodic payments, as the Retirement Board shall determine.

SECTION 9. FORMER EMPLOYEES OF THE DENISON ENGINEERING COMPANY

9.1 Anything in this Plan to the contrary notwithstanding, the provisions of this Section 9 shall apply to members who were in the employ of The Denison Engineering Company immediately prior to liquidation thereof on

August 31, 1956, provided continuous service since that time shall not have been broken.

9.2 If the full amount of the beneficial interest in The Denison Engineering Company Profit Sharing Trust of any such member is held in the trust for this Plan upon his retirement under this Plan, he shall be entitled to continuous service for the period from his last date of hire with The Denison Engineering Company to the date of its liquidation, salary with respect to such service shall be salary for the purposes of this Plan, and his normal pension per annum payable under this Plan shall not be less in amount than the sum of (i) an amount equal to 3/4 of 1% of the portion of his average final salary not in excess of $6,600, plus 1¼% of any excess portion of such average final salary, multiplied by the number of years of his continuous service subsequent to the liquidation of The Denison Engineering Company, plus (ii) an amount of pension of equivalent actuarial value to such beneficial interest together with interest thereon credited under this Plan by the Retirement Board to the date of his retirement.

9.3 In order to carry out the provisions of this Section 9 and account for the fully vested rights of members arising from The Denison Engineering Company Profit Sharing Trust, the Retirement Board shall maintain at all times a separate accounting of the amounts of such beneficial interests held in the trust for this Plan, together with a record of interest credited thereon from time to time, and in the event the Plan should ever be terminated such accounts shall receive the same preference accorded to retired members.

SECTION 10. WELLMAN EMPLOYEES

10.1 A Bedford employee for the purposes hereof is any person employed by the Company on a salaried basis in its S. K. Wellman Division at its business establishment in Bedford, Ohio (formerly The S. K. Wellman Company) or related locations thereunder; provided that until any sale or other disposition by the Company of its S. K. Wellman Division a Bedford employee transferred to other employment with the Company shall continue nevertheless to be a Bedford employee, and a person transferred from other employment with the Company shall not become a Bedford employee.

10.2 Anything in this Plan to the contrary notwithstanding on and after January 1, 1971 no Bedford employee shall be a member of this Plan except as provided in Sections 10.3 and 10.4.

10.3 All benefits of any retired member of the Retirement Plan for Wellman Salaried Employees who, while the Company owns said S. K. Wellman Division, elects to convert all or part of the fixed amount of his pension thereunder into a variable pension shall be payable under this Plan, notwithstanding subsequent sale or other disposition of said S. K. Wellman Division, provided assets of equivalent actuarial value to his benefits shall have been transferred to the trust under this Plan from the trust under the Retirement Plan for Wellman Salaried Employees; and such member shall

thereupon become a retired member of this Plan. If such member was one of the 25 highest paid employees under The S. K. Wellman Company Salaried Employees' Pension Plan on January 1, 1965 based on his remuneration for the year 1964, Section 7.3 of this Plan shall apply with respect to him, during the 10-year period then commencing, to the amendment of the aforesaid Wellman Plan merging it into this Plan as of that date.

10.4 In the event of and upon the sale or other disposition of said S. K. Wellman Division, any salaried employee not a member because he was formerly a Bedford Employee shall become a member with his benefits to be provided under this Plan with respect to his entire continuous service, and any Wellman salaried employee who is a member shall cease to be a member (as benefits with respect to his entire service are to be provided under the Retirement Plan for Wellman Salaried Employees). The Retirement Board shall determine the equivalent actuarial value of the benefits of employees whose membership is so transferred, and shall direct or arrange for the transfer of the net balance thereof, as appropriate, between the trust under this Plan and the trust under the aforementioned Retirement Plan for Wellman Salaried Employees, whereupon this sentence shall be deleted from this Plan as being no longer applicable and without further effect.

SECTION 11. VARIABLE PENSIONS

11.1 A member retired on or after January 1, 1969 may elect at the time of retirement or thereafter to convert all or part of the fixed amount of normal, early or deferred pension otherwise payable on his account (including an optional pension under Section 3.7, but not a benefit to be adjusted under Section 4.3) into a variable pension, in five steps at three month intervals, as provided in Section 11.3. Such an election may be made by a contingent annuitant receiving fixed pension payments of an optional pension under Section 3.7 after such a member's death. A member or contingent annuitant receiving a variable pension may elect to convert all or part of the amount thereof into a fixed pension, in one step, as provided in Section 11.5.

11.2 Any election under this Section 11 shall be made by written application filed with the Retirement Board. The month in which the application is acted upon by the Board after having been received shall be the month of application for the purposes of Section 11.3. The application shall designate an investment medium, which shall have been authorized by the Board, for determining the amount of variable pension payable from month to month.

11.3 Of the total amount of fixed pension to be converted, one-fifth shall be converted as of the close of the month of application, one-fifth as of the close of the month three months after the month of application, one-fifth as of the close of the month six months after the month of application, one-fifth as of the close of the month nine months after the month of application and the balance as of the close of the month one year after the

month of application. Any reduction for expenses in the amount of pension shall be made at the time of conversion.

11.4 The amount of variable pension payable from month to month after the month of conversion shall be varied as of the close of each month by multiplying the amount payable the preceding month by the ratio of (i) the result of an investment assuming it were made at the beginning of the month in the designated investment medium and increased or decreased by the medium's investment increment or decrement during the month (including realized or unrealized gains or losses as well as all dividend or other income) to (ii) the result of an investment made at the beginning of the month and increased at a standard rate of return of one-twelfth of 3-3/4%.

11.5 The monthly amount of variable pension to be converted in a particular month into a fixed amount of pension shall be converted as of the close of such month.

11.6 If a retired member's pension is to be discontinued because of restoration to service as an employee, any amount of variable pension shall be converted automatically under Section 11.5 into a fixed amount of pension for the purposes of Section 4.4.

11.7 The Retirement Board, by arrangement with the Trustee, shall keep invested in the designated investment medium so much of the assets of the Plan as the Board shall find appropriate from time to time to provide the actuarially computed reserves for the variable benefits payable under this Section 11.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff, vs. ABEX CORPORATION, THE RETIREMENT BOARD OF THE RETIREMENT PLAN OF THE EMPLOYEES OF ABEX CORPORATION, DONALK K. RENNIE, and ILLINOIS CENTRAL INDUSTRIES, INC., Defendants.	CIVIL ACTION, FILE #75-166 NOTICE OF APPEARANCE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT:

I hereby enter the appearance of Samuelson, Bloomberg, Portnow, Schuster & Lang, Ltd., for Defendants, ABEX CORPORATION, THE RETIREMENT BOARD OF THE RETIREMENT PLAN OF THE EMPLOYEES OF ABEX CORPORATION, DONALD K. RENNIE and ILLINOIS CENTRAL INDUSTRIES, INC., in the above-entitled cause.

Dated at Burlington, Vermont, this _____ day of August, 1975.

SAMUELSON, BLOOMBERG, PORTNOW,
SCHUSTER & LANG, LTD.

By: _____
Stephen M. Schuster, Jr.
A Member of the Firm

SAMUELSON, BLOOMBERG,
PORTNOW, SCHUSTER
& LANG, LTD.
ATTORNEYS AT LAW
BURLINGTON, VERMONT
05401

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff, vs. ABEX CORPORATION, THE RETIREMENT BOARD OF THE RETIREMENT PLAN OF THE EMPLOYEES OF ABEX CORPORATION, DONALD K. RENNIE, and ILLINOIS CENTRAL INDUSTRIES, INC., Defendants.	Civil Action, File #75-166 MOTION TO DISMISS

NOW COME Defendants, ABEX CORPORATION (hereinafter referred to as "Abex"), THE RETIREMENT BOARD OF THE RETIREMENT PLAN OF THE EMPLOYEES OF ABEX CORPORATION (hereinafter referred to as "Board"), DONALD K. RENNIE (hereinafter referred to as "Rennie"), and ILLINOIS CENTRAL INDUSTRIES, INC. (hereinafter referred to as "IC"), by and through their attorneys, Samuelson, Bloomberg, Portnow, Schuster & Lang, Ltd., and hereby move the Court to dismiss the action for lack of jurisdiction over the person, defective service of process, and improper venue, or in lieu thereof to quash the return of Summons on the ground that:

A. ABEX is a corporation organized under the laws of the State of Delaware, with principal offices in New York, New York and was not and is not subject to service of process within the District of Vermont as more clearly appears in the Affidavit attached hereto and incorporated by reference herein marked Exhibit A.

B. BOARD administers a Retirement Plan for ABEX and exists solely in New York, New York, and was not and is not subject to service of process within the District of Vermont, as more clearly appears in the Affidavit attached hereto and incorporated by reference herein marked Exhibit B.

C. IC is a corporation organized under the laws of Delaware, with principal offices in Chicago, Illinois, and was not and is not subject to service of process within the District of Vermont as more clearly appears in the Affidavit attached hereto and incorporated by reference herein marked Exhibit C.

D. RENNIE is a member of the BOARD, a citizen of Connecticut, and was not and is not subject to service of process within/the District of Vermont as more clearly appears in the Affidavit attached hereto and incorporated by reference herein marked Exhibit B.

or without

WHEREFORE, in accordance with Rule 12(b)(2)(3)(4) and (5), Federal Rules of Civil Procedure, each Defendant requests the Court issue an order dismissing the action against each and every one of them for improper venue or in lieu thereof to quash the return of service as to each and every Defendant.

Dated at Burlington, Vermont, this 4th day of September, 1975.

SAMUELSON, BLOOMBERG, PORTNOW, SCHUSTER & LANG, LTD.

By: Stephen M. Schuster
Stephen M. Schuster, Jr.
A Member of the Firm

SAMUELSON, BLOOMBERG, PORTNOW, SCHUSTER & LANG, LTD. ATTORNEYS AT LAW BURLINGTON, VERMONT

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff, -against- ABEX CORPORATION, THE RETIREMENT BOARD OF THE RETIREMENT PLAN OF THE EMPLOYEES OF ABEX CORPORATION, DONALD K. RENNIE, and ILLINOIS CENTRAL INDUSTRIES, INC., Defendants.	Civil Action File No. 75-166 AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

H. C. BUSCHMAN, JR., being first duly sworn upon oath, deposes and says that:

He is Vice-President, Secretary and General Counsel of Abex Corporation, which was organized and is existing under the laws of the State of Delaware. The principal offices of the Corporation are in New York, New York.

Abex Corporation is not qualified to do business in the State of Vermont, nor is it required under the laws of the State of Vermont to do so.

Abex Corporation does not do any business whatsoever in the State of Vermont and has no plants, factories, facilities, offices, telephone listings, agents, salesmen or other employees in the State of Vermont nor did the plaintiff, during his employment, perform any services for Abex Corporation in the State of Vermont.

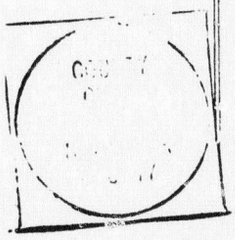
Moreover, the subject matter of the acts complained of did not arise out of any action taken by Abex Corporation

in any way in the State of Vermont.

H C Buschman. Jr.
H. C. BUSCHMAN, JR.

Sworn to before me this
2ND day of ~~August~~ September 1975.

Ira E. Wiener
Notary Public
IRA E. WIENER
Notary Public, State of New York
No. 43-4508409
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1977



State of New York }
County of New York, } ss.:

Form 1

No. 7739

I, NORMAN GOODMAN, County Clerk and Clerk of the Supreme Court of the State of New York, in and for the County of New York, a Court of Record, having by law a seal,

DO HEREBY CERTIFY pursuant to the Executive Law of the State of New York, that

Ira E. Wiener

whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a NOTARY PUBLIC in and for the State of New York duly commissioned, sworn and qualified to act as such; that pursuant to law, a commission or a certificate of his official character, with his autograph signature has been filed in my office; that at the time of taking such proof, acknowledgment or oath, he was duly authorized to take the same; that I am well acquainted with the handwriting of such NOTARY PUBLIC or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and I believe that such signature is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this

[illegible]

FEE PAID $3.00

94

Norman Goodman
County Clerk and Clerk of the Supreme Court, New York County

BEST COPY AVAILABLE

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff, -against- ABEX CORPORATION, THE RETIREMENT BOARD OF THE RETIREMENT PLAN OF THE EMPLOYEES OF ABEX CORPORATION, DONALD K. RENNIE, and ILLINOIS CENTRAL INDUSTRIES, INC., Defendants.	Civil Action File No. 75-166 AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

DONALD K. RENNIE, being first duly sworn upon oath, deposes and says that:

I am a citizen of Connecticut and a member of the Retirement Board (Board) of the Retirement Plan for the Salaried Employees of Abex Corporation (Plan).

The Board is the group which administers the Plan for the employees of Abex Corporation and has but one office at 530 Fifth Avenue, New York, New York 10036.

The Board consists of four members, all of whom work in offices at the above address and perform all of their duties thereunder in New York State.

The Board is not qualified to do business in the State of Vermont, nor is it required to register and has no offices, salesmen, employees, agents or other representatives in the State of Vermont. The Plan was negotiated, formulated, funded and settled upon the Board in the State of New York and the provisions of the Plan must be construed under the

law of New York.

I, individually, and as a member of the Board, acted in no way whatsoever in the State of Vermont regarding any of the acts complained of.

Moreover, the subject matter of the acts complained of did not arise out of any action taken by the Board in any way in the State of Vermont.

Donald K. Rennie
Donald K. Rennie

Sworn to before me this)
2ND day of ~~August~~ September 1975.)

Ira E. Wiener
Notary Public

IRA E. WIENER
Notary Public, State of New York
No. 43-4508409
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1977

COUNTY CLERK NEW YORK COUNTY

Form 1

State of New York, County of New York, } ss.: No. 7740

I, NORMAN GOODMAN, County Clerk and Clerk of the Supreme Court of the State of New York, in and for the County of New York, a Court of Record, having by law a seal,

DO HEREBY CERTIFY pursuant to the Executive Law of the State of New York, that

Ira E. Wiener

whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a NOTARY PUBLIC in and for the State of New York duly commissioned, sworn and qualified to act as such; that pursuant to law, a commission or a certificate of his official character, with his autograph signature has been filed in my office; that at the time of taking such proof, acknowledgment or oath, he was duly authorized to take the same; that I am well acquainted with the handwriting of such NOTARY PUBLIC or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and I believe that such signature is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this

FEE PAID $3.00

Norman Goodman
County Clerk and Clerk of the Supreme Court, New York County

EXHIBIT C

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff, vs. ABEX CORPORATION, THE RETIREMENT BOARD OF THE RETIREMENT PLAN OF THE EMPLOYEES OF ABEX CORPORATION, DONALD K. RENNIE, and ILLINOIS CENTRAL INDUSTRIES, INC., Defendants.	)	CIVIL ACTION, FILE #75-166 AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF ILLINOIS)
)SS.
COOK COUNTY)

Robert S. Kirby, being first duly sworn, upon oath deposes and says that:

He is the Vice-President and General Counsel of IC Industries, Inc. (formerly known as Illinois Central Industries, Inc.). IC Industries, Inc. was organized under the laws of the State of Delaware on . The principal offices of the Corporation are in Chicago, Illinois.

IC Industries, Inc. owns all of the outstanding stock of the Abex Corporation.

IC Industries, Inc. is a holding company, not qualified to do business in the State of Vermont, nor is it required to do so. IC Industries, Inc. does not do any business in the State of Vermont and has no offices or representatives in the State of Vermont.

IC Industries, Inc. has no business activities outside of the State of Illinois.

Moreover, the subject matter of the acts complained of

did not arise out of any action taken by IC Industries, Inc. in any way in the State of Vermont.

Dated at Chicago, Illinois, this 27th day of August, 1975.

Robert S. Kirby

STATE OF ILLINOIS)
)SS.
COOK COUNTY)

At Chicago, Illinois, this 29th day of August, 1975, Robert S. Kirby personally appeared, and he acknowledged this instrument, by him sealed and subscribed, to be his free act and deed.

Before me, Gloria S. Menzies
Notary Public

STATE OF ILLINOIS, COOK COUNTY. } ss. I, STANLEY T. KUSPER, JR., County Clerk of the County of Cook, Do Hereby Certify that I am the lawful custodian of the official record of Notaries Public of said County, and as such officer am duly authorized to issue certificates of magistracy, that Gloria S. Menzies whose name is subscribed to the proof of acknowledgment of the annexed instrument in writing, was, at the time of taking such proof of acknowledgment, a Notary Public in and for Cook County, duly commissioned, sworn and acting as such and authorized to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, to be recorded, in said State of Illinois, and to administer oaths; all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said Notary and verily believe that the signature to the said proof of acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

The law of Illinois does not require the impression of the Seal of a Notary Public to be filed in the County Clerk's Office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of Chicago, in the said County, this 29 day of August 1975

Stanley T. Kusper, Jr. County Clerk.
Robert J. Shrim Deputy.

FORM 319

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Kenneth A. Anderson
v.
Abex Corporation, et al

Civil Action
File No. 75-166

Entered "in" Dec. 16, 1975
Leone F. Sylvestro
Deputy Clerk

MEMORANDUM AND ORDER

The plaintiff Anderson complains as an aggrieved member of the Retirement Plan for the Salaried Employees of Abex Corporation (hereinafter the Plan) to bring this action against the Plan and its corporate and individual administrators alleging breach of fiduciary duties and breach of contract and violations of 29 U.S.C. §§ 301 et seq.[1/] Plaintiff seeks relief in the form of various orders relating to the administration of the Plan and punitive damages in the amount of $1,000,000. Reading the complaint in its broadest implication, it appears to invoke both diversity and federal question of jurisdiction under 28 U.S.C. §§ 1331 and 1332. All defendants have moved to dismiss the action for lack of personal jurisdiction, defective service and improper venue.

Since the cause of action arose prior to January 1, 1975, although filed after that date, as to the federal question, we are governed by the provisions of the Welfare and Pension Plan Disclosure Act, 29 U.S.C. §§ 301 et seq. Affidavits have been submitted by the defendants in support of the motions, disclaiming any significant contacts or activity in Vermont.

This action was commenced by service of process in the manner provided by the statutes of Vermont, as allowed by Fed.R.Civ.P. 4(e). The corporate defendants and the Retirement Board were reached by substituted service upon the

Secretary of State of Vermont under the provisions of 12 V.S.A. § 855.[2/] Process was personally served on the defendant Rennie, a member of the Retirement Board, by a federal marshal in New York City, pursuant to Vermont's long-arm statute 12 V.S.A. § 913.

Unlike its successor, the Welfare and Pension Plan Disclosure Act, the jurisdictional provisions of 29 U.S.C. § 308 do not provide for extraterritorial service of process. Thus, as to both jurisdictional grounds, the plaintiff can obtain in personam jurisdiction over the defendants by substituted service, only if the defendants have had sufficient "minimum contacts" in Vermont. International Shoe v. Washington, 326 U.S. 310 (1945). The pleadings and the unopposed affidavits filed in this case indicate that the defendants' contacts and activities consisted of, at most, three administrative letters mailed to the plaintiff in Vermont.[3/]

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws. Hanson v. Denckla, 357 U.S. 235, 253 (1958)

It is the law of Vermont that a plaintiff seeking to gain in personam jurisdiction over a nonresident defendant by resorting to service on the Vermont Secretary of State is called upon to plead sufficient facts to demonstrate that the defendant is within the reach of the applicable provisions of the Vermont "long arm" statute. O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 465 (1963).

While service pursuant to state statute is a permissible method of commencing actions in the federal district courts,

the out-of-state defendants can be subjected to the reach of the applicable state statute only in suits growing out of acts which have created essential contacts with the forum state. See Deveny v. Rheem Mfg. Co., 319 F.2d 124, 127 (2d Cir. 1963); V.R.C.P. 4(e) and Reporters Notes.

The cause of action asserted does not arise out of any constitutionally significant activity of the defendants in Vermont sufficient to warrant the exercise of personal jurisdiction over them by the courts of this state. See Hanson v. Denckla, supra, 357 U.S. at 235. The fact that the consequences of the defendants' activities have been felt in Vermont, standing alone, is insufficient to sustain an assertion of our jurisdiction over them. O'Brien v. Comstock Foods, Inc., supra, 123 Vt. at 465.

Therefore, it is ORDERED:

That the motions of the defendants to dismiss the action for lack of personal jurisdiction are granted.

Dated at Rutland, in the District of Vermont, this 9th day of December, 1975.

James S. Holden
Chief Judge

Footnotes

1/ The Welfare and Pension Plan Disclosure Act, 29 U.S.C. §§ 301 et seq., was repealed effective January 1, 1975, and is now embodied in the Employee Retirement Income Security Act of 1974. The enforcement provision of the new Act, 29 U.S.C. § 1132, does not apply to any cause of action which arose before January 1, 1975. 29 U.S.C. § 1144(b)(1). Since the complaint in this action does not indicate that the causes of action asserted arose after the effective date of 29 U.S.C. § 1132, this action is governed by 29 U.S.C. §§ 301-09.

2/ We note that service of process on the Retirement Board was defective, irrespective of our disposition of the case on other grounds. 12 V.S.A. § 855 allows substituted service on foreign corporations "doing business" in the state; it does not purport to provide a similar method of reaching non-corporate entities.

3/ At the time of his retirement from Abex Corporation in 1971, the plaintiff received a form letter from the Retirement Board informing him of the nature of his investments in the Plan; in late 1973, in response to the plaintiff's request, the defendant Board notified him that it would convert a certain part of his pension benefits; and on May 8, 1974, the defendants wrote to all variable pensioners under the Plan, including the plaintiff, informing them of the impending transfer of the management of the variable pension portfolio. There is no affirmative allegation in the pleadings that these letters were mailed to the plaintiff in Vermont. Presumably, since he moved to the state sometime after his retirement, the correspondence was sent to him in Vermont.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff	#
	#
vs	# CIVIL ACTION DOCKET NO. 75-166
	#
ABEX CORPORATION, et al., Defendants	# MOTION FOR RELIEF FROM OR AMENDMENT OF JUDGMENT ORDER

Now comes the plaintiff, Kenneth Anderson, by and through his attorneys, DeBonis and Wright, p.c., and moves the Honorable Court to grant relief, pursuant to F.R.C.P. 59 (e) and 60 (b), from its Order dated December 9, 1975, dismissing this action against all the defendants, and to order the matter reinstated upon the trial docket and as grounds for said motion states:

1. It appears from the affidavit attached hereto, that Abec Corporation, contrary to their sworn affidavit, solicits business from Vermont Corporations, and sells and delivers its products within the State of Vermont. This information indicates that the court's order was issued through mistake or inadvertence; that additional evidence has been discovered and that said order was based on the misrepresentation of the defendant, Abex Corporation.

2. That without the aid of the federal discovery procedures, plaintiff will be prevented from ascertaining the facts essential to the exercise of personal jurisdiction by this court.

DATED at Poultney, County of Rutland and State of Vermont, this _____ day of December, 1975.

/s/ Richard J. Wright, Esq.

Richard J. Wright, Esq.
A member of the firm
DeBonis and Wright, p.c.
25 Main Street
Poultney, Vermont 05764

JOSEPH A. DeBONIS
ATTORNEY AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff	#	
	#	
vs	#	CIVIL ACTION FILE NO. 75-166
	#	
ABEX CORPORATION, et al., Defendants	#	AFFIDAVIT

I, Richard J. Wright, attorney for the plaintiff, Kenneth A. Anderson, depose and say as follows:

1. I telephone the Morrisville office of the St. Johnsbury and Lamoille County Railroad and spoke to a gentleman who identified himself as Robert Vincelette and he advised me that his railroad company purchased parts and equipment from Abex Corporation within the last year.

2. I telephoned the St. Albans office of the Central Vermont Railway and spoke to a gentleman who identified himself as Chief Clerk Bernard Heman and he advised me that they regularly received parts and equipment from Abex Corporation.

3. Robert Gilmour, a member of our staff, telephoned the Montpelier office of Vermont Railways, Inc., and spoke with a gentleman who identified himself as Mr. Harold Filskou, purchasing agent. Mr. Filskou said that Vermont Railways buys brake shoes from Abex Corporation regularly and that their company receives various railroad magazines and that Abex Corporation advertisements appear therein.

DATED at Poultney, County of Rutland and State of Vermont, this 19th day of December, 1975.

/s/ Richard J. Wright, Esq.

Richard J. Wright, Esq.
A member of the firm
DeBonis and Wright, p.c.
25 Main Street
Poultney, Vermont 05764

JOSEPH A. DeBONIS
ATTORNEY AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff	§	
	§	
Vs.	§	AFFIDAVIT
	§	
ABEX CORPORATION, et al., Defendant	§	
	§	

I, Kenneth A. Anderson, on oath depose and say:

1. I am a retired employee of Abex Corporation, qualified to receive benefits under the Retirement Plan.

2. I have been domiciled in the State of Vermont since September 1, 1970.

3. For several months after becoming domiciled in the State of Vermont I continued to receive a salary from Abex Corporation and was considered a regular employee with the title of Assistant to the President. I did not receive a pension during this period.

4. I worked an average of two days a week in New York City and other Company locations and the remainder of the time I was at my residence in Vermont. I had many telephone contacts with various Company employees giving advice and supervision, not only on Abex Corporation matters, but also those pertaining to the company's retirement plans, since they were under my direction. I retired on April 1, 1971 and began receiving a pension. From time to time after that I served the Company in a consulting capacity on a per diem basis.

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ATTORNEYS AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

5. I am presently receiving monthly benefits from the Retirement Plan.

6. The Retirement Board advises me, presumably along with all other retired employees, of monthly changes in the basis for computing variable benefits under the Retirement Plan. This information is sent by mail to Vermont to assist me in deciding whether to convert benfits due me. The Retirement Plan also mails periodic reports on the plan's performance to me in Vermont and to other members of the Retirement Plan in their states of residence and also mails notices concerning changes in administration of the plan.

7. Prior to and subsequent to January 1, 1975 I requested in writing information concerning the administration of the Retirement Plan. Some of this information was not provided.

DATED at Poultney, County of Rutland and State of Vermont this 22nd day of January, 1976.

Kenneth A. Anderson

Subscribed and sworn to before me
this 22nd day of January, 1976

Notary Public

DeBONIS & WRIGHT
A PROFESSIONAL
CORPORATION
ATTORNEYS AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff	#	
	#	
vs	#	MOTION TO AMEND COMPLAINT
	#	
ABEX CORPORATION, et al., Defendant	#	

Now comes the plaintiff, by and through his attorneys, and asks leave of court to file the following amendment to his complaint pursuant to F.R.C.P. 15. Such proposed amendment is as follows:

1. By adding thereto a new paragraph 6a.

"6a. The Retirement Board is in the business of administering and distributing benefits due retired employees of Abex Corporation and has no other business activity. The benefits are distributed on a monthly basis to plaintiff in Vermont and have been since April of 1971.

The Retirement Board also provides and delivers to plaintiff in Vermont information compiled monthly by the Retirement Plan in the course of its business activity in order to allow plaintiff to make informed decisions regarding his benefit rights.

The Retirement Plan provides for notification to be given to the Board by plaintiff and other retired employees from their resident states of any election to change their benefit rights.

The plaintiff and other retired employees as a general matter, are permitted to make contact with The Retirement Board by mail and telephone from their state of residence.

The actions of the Retirement Board as a Board and as agent for Abex Corporation amounts to doing the business of the Retirement Board in Vermont and establishes sufficient contacts with Vermont to allow the courts of this state to exercise personal jurisdiction over the Retirement Board and Abex Corporation.

The federal courts in Vermont are therefore able to exercise personal jurisdiction over the Retirement Board and Abex Corporation for the purpose of providing retired employees of Abex Corporation with an available means of enforcing their statutory and contractual rights under the Retirement Plan. The burden placed on defendants by requiring them to defend such actions in the domiciliary of the retired employees is of far less consequence than would

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POULTNEY, VERMONT 05764

be the burden placed on each such employee to travel to New York for relief."

2. By adding thereto a new paragraph 6b.

"6b. Upon information and belief plaintiff alleges that the defendant, Abex Corporation sells, distributes and services its goods and products in the State of Vermont."

DATED at Poultney, County of Rutland and State of Vermont, this 22nd day of January, 1976.

/s/ Richard J. Wright, Esq.
Richard J. Wright, Esq.
A member of the firm
DeBonis and Wright, p.c.

DeBONIS & WRIGHT
A PROFESSIONAL
CORPORATION
ATTORNEYS AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Kenneth A. Anderson	)	
	)	Civil Action
v.	)	
	)	File No. 75-166
Abex Corporation, et al	)	

MEMORANDUM AND ORDER

By order of this court, filed December 10, 1975, the motions of the defendants to dismiss this action for lack of personal jurisdiction over them were granted. It appears that subsequent to the dismissal, the plaintiff undertook a telephonic investigation of certain Vermont railroad companies to inquire whether they have purchased products of Abex Corporation.[1] According to the plaintiff's affidavit, this inquiry revealed that at least three resident railroad companies have purchased parts and equipment from Abex Corporation in the past. On the strength of these facts to the effect that Vermont has been a market for Abex products, plaintiff filed a motion, under Fed.R.Civ. P. 59 and 60(b), on December 22, 1975,[2] for relief from the earlier order of dismissal on the ground that that order was premised on the misrepresentation of Abex Corporation, by affidavit, that it did not do business in the State of Vermont.[3]

In order for the long-arm of 12 V.S.A. § 855 to reach the defendants in this action, the plaintiff must show that the conduct or activity of the defendants in the forum state gave rise to the particular causes of action asserted here. See

Hanson v. Denckla, 357 U.S. 235, 251 (1958); Davis v. Saab-Scandia of America, Inc., 133 Vt. 317, 320-21 (1975).

Recently the Supreme Court of the State of Vermont, in Davis v. Saab-Scandia of America, Inc., had occasion to analyze the nature of the contacts required to sustain jurisdiction under 12 V.S.A. § 855, in the context of an action for breach of warranty, negligent manufacture and misrepresentation, arising out of the sale of a Saab automobile in Connecticut by a Connecticut dealer to a Virginia resident. The suit was brought by a resident of Vermont, an assignee of the purchaser. The trial court found extensive contacts between the defendant, Saab-Scandia of America, Inc., which was a distributor of Saab automobiles, and several Vermont dealerships operating under it, which are contractually bound to honor its warranties. Moreover, the lower court found that the defendant "actively participated in the Vermont market, and intentionally conducted business in Vermont." 133 Vt. at 319.

In finding that the cause of action asserted did not arise out of any activity or conduct of the defendant in Vermont, the Vermont Supreme Court considered the necessary link between the contacts on which jurisdiction is predicated and the claims asserted.

> [W]hatever the activities here may have been, or have been found to be, it is undisputed that the suit results from a sale made in Connecticut, by a Connecticut dealer, to Virginia residents. Were plaintiff's position the correct one, any corporation with minimal contacts in Vermont could be sued in Vermont, by substituted service, for any tort committed by it, or contact entered into by it, wherever so committed or

> entered into. Such is not the law. To satisfy the due process requirements of the Fourteenth Amendment, the requirements explicitly stated in the statute must be met; the suit must arise or grow out of the contact or activity asserted as the basis of liability. Smyth v. Twin State Improvement Corp., 116 Vt. 569, 573, 80 A.2d 664 (1951); O'Brien v. Comstock Foods, 123 Vt. 461, 465, 194 A.2d 568 (1963); Hanson v. Denckla, 357 U.S. 235, 251 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963).

Id. at 321

Given the assertion of the plaintiff here, that Abex Corporation has actively participated in the Vermont market by selling its products in State, he is, nevertheless, left in the same position as the plaintiff in the Davis case, since no suggestion has been made that any of the alleged activity of Abex Corporation in Vermont gave rise to the particular causes of action alleged in his complaint. The essence of the plaintiff's complaint is that defendants have mismanaged the Retirement Plan of the Salaried Employees of Abex Corporation; whether or not Abex Corporation has sold brake shoes to certain Vermont railroad companies in the past has no bearing on this present action, absent any showing of the connection between that activity and this claim.

More importantly, it is clear that the brunt of plaintiff's complaint is directed at the Retirement Board of the Retirement Plan of the Salaried Employees of Abex Corporation. No constitutionally significant activity or contacts of the Board with this State have been brought to the attention of the court to confer in personam jurisdiction over the Board by substitute service on the Vermont Secretary of State. Even if the court were to vacate its order of dismissal and find

personal jurisdiction over Abex Corporation, it would still be compelled to dismiss the action for failure to join the Retirement Board, who concededly is an indispensable party. Fed.R.Civ.P. 19(b). We decline, therefore, to reopen this case; and it is ORDERED:

That the motion of the plaintiff for relief from judgment under Fed.R.Civ.P. 59 and 60(b) is denied.

Dated at Rutland, in the District of Vermont, this 30th day of January, 1976.

James S. Holden
Chief Judge

Footnotes

1/ From the record it appears that this inquiry was the first made by the plaintiff as to the jurisdictional facts of the case. At hearing on defendants' motions to dismiss on November 7, 1975, the plaintiff, who had been aware of the legal position of the defendants for over two months, offered no evidence or affidavits controverting the position taken by the defendants which had been supported by affidavit.

2/ We note that plaintiff's motion under Fed.R.Civ.P. 59 was timely since December 22, 1975, fell on a Monday. Fed.R.Civ.P. 6(a).

3/ While we agree that the defendant's affidavit in support of its motion to dismiss may have been misleading, viewing "doing business" as a jurisdictional term of art as the defendant contends it was intended, we do not consider the affidavit to have misrepresented relevant facts.

65

COPY

Filed February 27, 1976
EDWARD J. TRUDELL
Clerk

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

KENNETH A. ANDERSON, Plaintiff	#	Civil Action, File No. 75-166
vs	#	NOTICE OF APPEAL
ABEX CORPORATION, et al., Defendants	#	

Notice is hereby given that KENNETH A. ANDERSON the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order granting defendants' motion to dismiss for lack of personal jurisdiction entered in this action on December 9, 1975, and from the Order denying the motion of plaintiff for relief from judgment under Fed. R. Civ. P. 59 and 60 (b) entered in this action on January 30, 1976.

DATED February 26, 1976.

/s/ Richard J. Wright, Esq.

Richard J. Wright, Esq.
DeBonis and Wright, p.c.
25 Main Street
Poultney, Vermont 05764

DeBONIS & WRIGHT
A PROFESSIONAL
CORPORATION
ATTORNEYS AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

Title 12 V.S.A. §855 - Doing Business as appointment of process agent.

If the contact with the state of the activity in the state of a foreign corporation, or the contact of activity imputable to it, is sufficient to support a Vermont personal judgment against it the contact of activity shall be deemed to be doing business in Vermont by that foreign corporation and shall be equivalent to the appointment by it of the Secretary of the State of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against it arising or growing out of that contact or activity, and also shall be deemed to be its agreement that any process against it which is so served upon the Secretary of State shall be of the same legal force and effect as if served on the foreign corporation at its principal place of business in the state or country where it is incorporated according to the law of that state of country.

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A PROFESSIONAL
CORPORATION
ATTORNEYS AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764

Title 12 V.S.A. §913 - Effect of service outside the state.

(a) When process is served upon a party outside the state in such manner as the supreme court may by rule provide, the same proceedings may be had, so far as to affect the title or right to the possession of goods, chattels, rights, credits, land, tenements or hereditaments in the state as if the process had been served on a party in the state.

(b) Upon the service, and if it appears that the contact with the state by the party or the activity in the state by the party or the contact or activity imputable to him is sufficient to support a personal judgment against him, the same proceedings may be had for a personal judgment against him as if the process or pleading had been served on him in the state.

(c) The provisions of subsection (b) are in addition to all existing manner of service, rights and remedies, and the availability of a personal judgment by reason of subsection (b) shall make the provisions of sections 855, 856, 891 and 892 of this title and section 1630 of Title 11 alternative and not inoperative.

DeBONIS & WRIGHT
A PROFESSIONAL
CORPORATION
ATTORNEYS AT LAW
25 MAIN STREET
POULTNEY, VERMONT 05764